

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



# 75-7339 & 75-7350

## United States Court of Appeals For the Second Circuit.

MICHAEL CASTELLANO,

*Plaintiff-Appellee,*

v.

RUDOLPH A. OETKER, "POLARSTEIN,"

*Defendant-Appellee-Appellant.*

RUDOLF OETKER,

*Third-Party Plaintiff-Appellee-Appellant,*

v.

BAY RIDGE OPERATING CO. INC. and STANDARD FRUIT &  
STEAMSHIP CO.,  
*Third-Party Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK.

### APPENDIX.

SERGI & FETELL

*Counsel to*

JOHN J. LANGAN

*Attorney for Third-Party Defendant-Appellant*

*Standard Fruit & Steamship Company*

44 Court Street

Brooklyn, N. Y. 11201

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*Attorneys for Third-Party Defendant-Appellant*

*Bay Ridge Operating Co. Inc.*

120 Broadway

New York, N. Y. 10005

CHANOWICZ & CALLAN

*Attorneys for Defendant-Appellee-Appellant, Ru-*

*doiph A. Oetker, "Polarstein," and Third-*

*Party Plaintiff-Appellee-Appellant*

80 Broad Street

New York, N. Y. 10004

IRVING B. BUSHLOW

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26 Court Street

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## Index to Appendix.

	Page
Docket Entries .....	1a
Amended Complaint .....	6a
Third-Party Complaint .....	8a
Answer of Third-Party Defendant Standard Fruit & Steamship Co. and Cross-Complaint .....	13a
Third-Party Standard Fruit's Answer to Cross- Complaint .....	16a
Third-Party Defendant Bay Ridge Operating Co., Inc.'s Reply to Cross-Claim .....	18a
Answer of Third-Party Defendant Bay Ridge Op- erating Co., Inc., to Amended Complaint .....	20a
Bay Ridge's Answer to Third-Party Complaint, Counterclaim and Cross-Claim .....	23a
Excerpts From Transcript .....	30a
Motions .....	123a
Charge .....	209a
Requests to Charge and Exceptions .....	232a
Verdict .....	234a
Special Verdict of Jury .....	235a
Opinion of Trial Court .....	237a
Judgment .....	245a

	Page
Addendum to Judgment .....	247a
Notice of Appeal—Standard Fruit .....	248a
Notice of Appeal of Bay Ridge Operating Co., Inc. ....	250a
Notice of Protective Cross-Appeal by Defendant and Third-Party Plaintiff Rudolf A. Oetker .....	252a

#### TESTIMONY.

##### WITNESSES FOR PLAINTIFF:

###### Castellano, Michael:

Direct by Mr. Bushlow .....	30a
Cross by Mr. Sergi .....	47a
Cross by Mr. Cichanowicz .....	71a
Re-direct by Mr. Bushlow .....	75a

###### Jackson, Willie:

Direct by Mr. Bushlow .....	96a
Cross by Mr. Sergi .....	121a

###### Salvatore, Edward:

Direct by Mr. Bushlow .....	78a
Cross by Mr. Sergi .....	88a

##### WITNESSES FOR DEFENDANT:

###### Keeler, Paul J.:

Direct by Mr. Sergi .....	160a
Cross by Mr. Bushlow .....	188a

###### Recalled:

Cross by Mr. Bushlow (continued) .....	193a
Re-direct by Mr. Sergi .....	204a
Re-cross by Mr. Bushlow .....	205a
Cross by Mr. Hart .....	207a

Loverne, Dr. John:	
Direct by Mr. Hart .....	193a
Nicotro, Anthony:	
Direct by Mr. Sergi .....	136a
Cross by Mr. Bushlow .....	148a

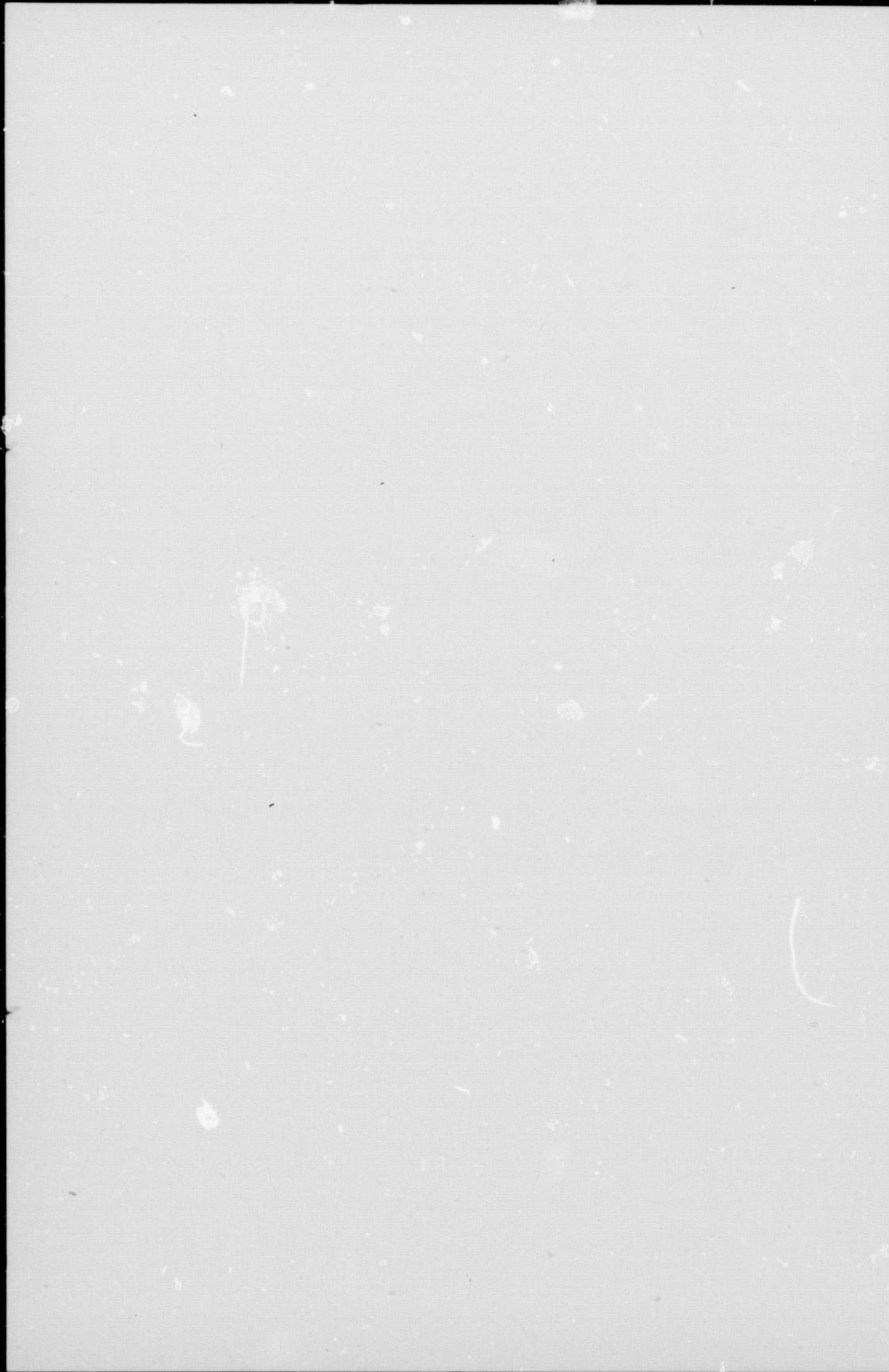
## EXHIBITS.

## DEFENDANT'S EXHIBITS:

- AA-1. Photograph of conveyor. Reproduced in separate exhibit volume at page 2
- AA-2. Photograph of conveyor. Reproduced in separate exhibit volume at page 4
- AA-3. Photograph of conveyor. Reproduced in separate exhibit volume at page 6
- AA-4. Photograph of conveyor. Reproduced in separate exhibit volume at page 8

## PLAINTIFF'S EXHIBIT:

- 4. Small colored photograph of conveyor. This exhibit is being transmitted to the Court as an original exhibit.



**UNITED STATES COURT OF APPEALS**

FOR THE SECOND CIRCUIT.

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MICHAEL CASTELLANO,

*Plaintiff-Appellee,*  
*against*

RUDOLPH A. OETKER, "TOLARSTEIN,"

*Defendant-Appellee-Appellant.*

---

RUDOLPH OETKER,

*Third Party Plaintiff-Appellee-Appellant,*

*against*

BAY RIDGE OPERATING CO. INC. and STANDARD FRUIT &  
STEAMSHIP CO.,

*Third Party Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF NEW YORK.

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**Docket Entries.**

Date	Filings-Proceedings
1972	
Oct. 27	Complaint filed. Summons issued.
Nov. 9	Summons returned & filed/executed.
1973	
Feb. 8	Amended complaint filed. Suppl summons issued.
Feb. 26	Supplemental summons returned and filed/executed.

*Docket Entries*

- July 3 Notice to take deposition of pltff filed.  
July 3 Deft's interrogatories to pltff filed.  
July 3 Answer filed.  
July 6 Third-party complaint filed. Third-party summons issued.  
July 25 Notice of appearance of 3rd-pty deft. Bay Ridge Operating Co., Inc. filed.  
July 26 Third-party summons returned and filed/executed.  
Aug. 1 Answer of Bay Ridge Operating Co. to amended complaint filed.  
Aug. 1 Answer of Bay Ridge Operating Co. to third-party complaint, counter-claim and cross complaint filed.  
Aug. 2 Pltff's answers to interrogatories filed.  
Aug. 2 By Costantino, J.—Order dtd 8-1-73 extending time of Bay Ridge Operating Co. Inc. to answer complaint to 8-27-73 filed.  
Aug. 6 Answer of Rudolf A. Oeiker to counterclaim of Bay Ridge Operating Co. Inc. filed.  
Aug. 13 Notice to Admit. Filed.  
Sept. 12 Answer of Third Party Deft. Standard Fruit & Steamship Co. with cross claim and with demand for jury trial.  
Sept. 14 Deft's notice to admit filed.  
Sept. 21 Bay Ridge Operating Co., reply to cross-claim of Standard Fruit & Steamship Co., filed.  
Oct. 3 Interrogatories propounded by deft Standard Fruit & Steamship Co. to be answered by the third party Co-defendant Bay Ridge Operating Co., Inc. filed.  
Oct. 3 Interrogatories propounded by deft to be answered by the pltff filed.  
Oct. 3 Interrogatories propounded by deft to be answered by third party pltff filed.  
Oct. 23 Answers to interrogatories by third party deft Bay Ridge Operating Co., Inc. filed.

*Docket Entries*

- Dec. 7 Notice to take deposition of Michael Castellano  
*et al.* filed.
- Dec. 11 Before Costantino, J.—Case called & adjd. to  
3-11-74 at 10 A.M. for report.
- Dec. 20 Pltff's answers to interrogatories filed.  
1974
- Mar. 5 Deft's answers to third-party deft's interrogatories filed.
- Mar. 11 Before Costantino, J.—Case called—Adj'd to  
3/14/74 for status report.
- Mar. 14 Before Costantino, J.—Case called—Adj'd to  
3/21/74.
- Mar. 21 Before Costantino, J.—Case called & adjd. to  
3-28-74 @ 10:00 A.M. for report.
- Mar. 28 Before Costantino, J.—Case called—Adj'd to  
4/4/74 for status report.
- Apr. 4 Before Costantino, J.—Case called—Adj'd to  
5/13/74 for trial
- Apr. 10 Third party deft, Standard Fruit & Steamship  
Co.'s answer to cross complaint filed.
- Apr. 25 Notice of Appearance filed (for deft Standard  
Fruit and Steamship Co.)
- May 13 Before Costantino, J.—Case called & adjd.  
6-26-74 @ 10:00 A.M. for trial
- July 19 Before Platt, J.—Case called. Pre-trial con-  
ference set for 9-9-74 at 10 A.M.
- Sept. 4 Notice of third party deft Standard Fruit &  
Steamship filed.
- Sept. 9 Before Platt, J.—Case called & adj'd to 9-13-74.
- Sept. 12 Notice of third party deft Standard Fruit &  
Steamship will move to get permission to  
amend its answer filed.
- Sept. 13 Before Platt, J.—Case called—Conference held  
and concluded—Pre-trial ordered amended  
see Order.

*Docket Entries*

1975

- Jan. 2 Before Platt, J.—Case called—Ready and passed.
- Feb. 27 Before Platt, J.—Case called, Adj'd to 3-5-75 for trial.
- Mar. 5 Before Platt, J.—Case called—Trial ordered and begun—Jurors selected and sworn—Trial cont'd to 3/6/75.
- Mar. 10 Before Platt, J.—Case called. Trial resumed. Trial cont'd to 3-11-75.
- Mar. 11 Before Platt, J.—Case called. Trial resumed. Trial continued to 3-12-75.
- Mar. 12 Before Platt, J.—Case called. Trial resumed. Trial cont'd to 3-13-75.
- Mar. 14 By Platt, J.—Order of sustenance dtd 3-13-75 filed.
- Mar. 13 Before Platt, J.—Case called, trial concluded.
- Mar. 24 Notice of Motion, ret. 4/4/75 filed re: for an order setting aside and vacating the jury verdict, etc.
- Mar. 26 Notice of motion ret 4-4-75 for an order pursuant to Rule 50 granting to deft judgment notwithstanding the jury verdict, etc. and memorandum in support of motion filed.
- Mar. 27 Notice of motion for judgment notwithstanding verdict ret April 4, 1975 filed.
- Apr. 1 Memorandum of deft in support of 3rd party claim for indemnity filed.
- Apr. 2 Reply memorandum of deft & third-party pltff filed.
- Apr. 4 Before Platt, J.—Case called. Deft's motion for judgment notwithstanding verdict, etc. argued. Decision reserved.
- May 10 By Platt, J.—Opinion dtd 5-9-75 dismissing cross claim and counterclaim, filed. See opinion. (p/c mailed)

*Docket Entries*

- Mar. 13 Before Platt, J.—Case called. Trial resumed. Jury returns with a verdict in favor of the pltff in the sum of \$75,000. as against the deft Rudolph A. Oetker. Judgment to be entered when all the issues are decided. Pltff to be entitled to interest from March 13, 1975 by stipulation. All motions within 10 days. All papers within 30 days. Jury polled. Jury discharged. Trial concluded. (calendar entry completed from reverse side for 3-13-75)
- May 21 Judgment dtd 5-20-75 that pltff recover of the deft Rudolf A. Oetker the sum of \$75,000 with interest from 3-18-75; that the deft and third party pltff Rudolf A Oetker recover of the third party deft Standard Fruit & Steamship the sum of \$37,500 with interest etc.; that the deft Rudolf Oetker be fully indemnified by the third party deft, Bay Ridge Operating Co. for its portion of the damages etc; that the cross claims interposed by the third party deft etc. are dismissed etc. See judg. Approved by Platt, J. (p/c mailed to attys).
- May 29 Notice of appeal filed. Copies mailed accordingly.

**Amended Complaint.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

---

MICHAEL CASTELLANO,

*Plaintiff,*

*against*

RUDOLPH A. OETKER, "POLARSTEIN,"

*Defendant.*

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72 C 1443

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Plaintiff for his complaint respectfully sets forth as follows:

FIRST: That at all times hereinafter mentioned the plaintiff was and is a citizen of the United States and of the State of New York residing at 1248 East 12th Street, Brooklyn, New York.

SECOND: Upon information and belief that at all times hereinafter mentioned the defendant was a foreign corporation with a place of doing business located at 26 Broadway, New York, New York.

THIRD: Upon information and belief that at all the times hereinafter mentioned the defendant was the owner of the "Polarstein".

FOURTH: That at all the times hereinafter mentioned the said defendant operated, controlled, manned and provisioned the said vessel.

FIFTH: That on or about the 18th day of January, 1970, the said vessel was moored at Pier 42, North River, New York, New York.

*Amended Complaint*

SIXTH: That on or about the 18th day of January, 1970, the said defendant had engaged the services of Bay Ridge Operating Co., Inc. to perform stevedoring operations aboard the "Polarstein."

SEVENTH: That on or about the 18th day of January, 1970, while plaintiff Michael Castellano, was lawfully aboard the "Polarstein" as an employee of Bay Ridge Operating Co., Inc. he was caused to sustain severe and permanent personal injuries through no fault or want of care on his part but solely as a result of the carelessness and negligence of the defendant, its servants, agents, and/or employees, in failing to provide the plaintiff with a safe place to work and/or the failure of said defendant to provide plaintiff with a seaworthy vessel.

EIGHTH: That as a result of the foregoing plaintiff was disabled and endured great pain and suffering, required medical care for the alleviation and cure of his injuries and was compelled to forego his customary occupation and recreation all to his damages in the sum of One Hundred Thousand (\$100,000.00) Dollars.

NINTH: That this honorable court has jurisdiction over the parties herein and the subject matter of this action pursuant to section 1332 and 1333 of the United States Code.

WHEREFORE, plaintiff demands judgment in the sum of One Hundred Thousand (\$100,000.00) Dollars together with costs and disbursements of this action against the defendant herein.

Dated: Brooklyn, N. Y.  
February , 1973

Yours, etc.,

IRVING B. BUSHLOW  
Attorney for Plaintiff  
26 Court Street  
Brooklyn, New York 11201  
MA5-1336

**Third-Party Complaint.**

UNITED STATES DISTRICT COURT,  
EASTERN DISTRICT OF NEW YORK.

---

MICHAEL CASTELLANO,

*Plaintiff,*

*against*

RUDOLF A. OETKER, "POLARSTEIN,"

*Defendant.*

---

RUDOLF A. OETKER,

*Defendant and Third-Party  
Plaintiff,*

*against*

BAY RIDGE OPERATING Co., Inc., and STANDARD FRUIT  
STEAMSHIP Co.,

*Third-Party Defendants.*

72 C 1443

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Defendant and third-party plaintiff, as and for his third-party complaint by his attorneys, Cichanowicz & Callan, alleges upon information and belief as follows:

AS AND FOR A FIRST CAUSE OF ACTION AGAINST BAY RIDGE OPERATING Co., INC.

FIRST: That at all the times hereinafter mentioned, the defendant and third-party plaintiff, Rudolph A. Oetker, was and still is a foreign citizen and resident of the Republic of West Germany.

*Third-Party Complaint*

SECOND: That at all the times hereinafter mentioned, the third-party defendant, Bay Ridge Operating Co., Inc., was and still is a corporation with an office and principal place of business at Five World Trade Center, Suite #7411, in the Borough of Manhattan, City and State of New York.

THIRD: That on or about February, 1973, a supplemental summons and amended complaint was served upon defendant's and third-party plaintiff's general agent, on behalf of Michael Castellano, to recover damages for personal injuries allegedly sustained on January 18, 1970 while said Michael Castellano was employed as a longshoreman by Bay Ridge Operating Co., Inc., aboard the SS Polarstein. The amended complaint, a copy of which is annexed hereto, alleges that the plaintiff sustained injuries because, amongst other things, he was not provided with a safe place in which to work and with a seaworthy vessel.

FOURTH: That some time prior to January 15, 1970, Bay Ridge Operating Co., Inc. agreed and undertook to provide stevedoring services aboard the SS Polarstein, which among other things, included providing necessary personnel, equipment, tools and supervision for the proper performance of said work.

FIFTH: That on January 15 and January 16, 1970, Bay Ridge Operating Co., Inc., its agents, servants and/or employees were aboard the SS Polarstein, and engaged in the performance of the stevedoring services which they had agreed to provide.

SIXTH: That by virtue of the agreement aforesaid, and by reason of having undertaken and actually engaged in the performance of stevedoring work aboard the SS Polarstein, it was the duty of Bay Ridge Operat-

*Third-Party Complaint*

ing Co., Inc. to render the services undertaken in a reasonably safe, proper, careful, prudent and workmanlike manner.

SEVENTH: That if the plaintiff herein recovers against the defendant and third-party plaintiff by reason of the premises set forth in the complaint, said liability, which is denied will have been brought about and caused by the breach on the part of the third-party defendant, Bay Ridge Operating Co., Inc. of its warranty to perform its services in a reasonably safe, proper, careful, prudent and workmanlike manner, and by the active primary and affirmative negligence and fault of this said third-party defendant.

EIGHTH: That the defendant and third-party plaintiff will necessarily incur expenses in the defense of this action, including reasonable counsel fees.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST STANDARD FRUIT & STEAMSHIP Co.

NINTH: Defendant and third-party plaintiff repeats and reallages paragraphs numbered "First" through "Ninth" with the same force and effect as if set forth herein at length, and in addition thereto alleges:

TENTH: That at all times hereinafter mentioned, the third-party defendant, Standard Fruit & Steamship Co., was and still is a corporation with an office and principal place of business at Pier 42 East River in the Borough of Manhattan, City and State of New York.

ELEVENTH: That some time prior to January 15, 1970, Standard Fruit & Steamship Co., agreed and undertook to provide various vessels, which included the SS Polarstein, with, amongst other things, safe, proper, fit, and seaworthy equipment and tools needed for the proper discharge of bananas from the said vessel.

*Third-Party Complaint*

TWELFTH: That on January 15 and January 16, 1970, third-party defendant, Standard Fruit & Steamship Co., by its agents, servants and/or employees did supply the SS Polarstein with the necessary materials and the conveyor equipment and tools needed for the discharge of bananas.

THIRTEENTH: That the said third-party defendant did own the aforesaid mentioned necessary materials and conveyor equipment and tools on January 15 and January 16, 1970.

FOURTEENTH: That the said third-party defendant, negligently, carelessly and recklessly failed to supply reasonably safe, proper, fit and seaworthy materials and conveyor equipment and tools, but instead, negligently, carelessly, and recklessly supplied defective, improper, unfit, unsafe and unseaworthy material and conveyor equipment and tools.

FIFTEENTH: That if the plaintiff herein recovers against the defendant and third-party plaintiffs, by reason of the premises set forth in the complaint, said liability, which is denied, will have been brought about and caused by the breach on the part of the third-party defendant, Standard Fruit & Steamship Co., of its duty to supply reasonably safe, proper, fit and seaworthy materials and conveyor equipment and tools and by the active and affirmative negligence and fault of this said third-party defendant.

SIXTEENTH: That the defendant and third-party plaintiff will necessarily incur expenses in the defense of this action, including reasonable counsel fees.

WHEREFORE, it is respectfully prayed that if the defendant and third-party plaintiff is held liable in this action to the plaintiff, then the third-party defendants

*Third-Party Complaint*

should be required to indemnify it, the defendant, and third-party plaintiff, in full for all damages recovered by the plaintiff, plus counsel fees, expenses and disbursements incurred in the defense of this action, and that in any event, the defendant and third-party plaintiff should be indemnified by the third-party defendants for counsel fees and the expenses and disbursements incurred in the defense of this action, and that the Court grant to the defendant and third-party plaintiff such other, further and different relief as the justice of the cause may require.

CICHANOWICZ & CALLAN

By: VICTOR S. CICHANOWICZ

A Member of the Firm

Attorneys for Defendant and  
third-party Plaintiff

80 Broad St.  
New York 10004

**Answer of Third-Party Defendant Standard Fruit & Steamship Co. and Cross-Complaint.**

The third party defendant, Standard Fruit & Steamship Co., by its attorney, John J. Langan Esq., answering the third party complaint herein, respectfully alleges upon information and belief:

**FIRST:** Denies any knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraphs designated: First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Thirteenth.

**SECOND:** Denies each and every allegation contained in the paragraphs designated: Fourteenth, Fifteenth, Sixteenth.

**THIRD:** Denies each and every allegation contained in the paragraph designated: Eleventh except admits; that some time prior to January 15, 1970, Standard Fruit & Steamship Co., agreed and undertook to provide various vessels, which included the SS Polarstein, with equipment and tools needed for the discharge of bananas from the said vessel.

**FOURTH:** Admits each and every allegation contained in the paragraphs designated: Tenth, Twelfth.

**FIFTH:** Repeats above denials for paragraphs "First" through "Ninth" which is recited in paragraph Ninth in the second cause of action.

AS AND FOR A CROSS CLAIM AGAINST THIRD PARTY CO-DEFENDANT, BAY RIDGE OPERATING CO. INC., THIRD PARTY DEFENDANT STANDARD FRUIT & STEAMSHIP CO. ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

**SIXTH:** That if plaintiff sustained the injuries and damages in the manner and at the time and place alleged, and if it is found that the answering third party defendant is liable to plaintiff herein, all of which is

*Answer of Third-Party Defendant Standard Fruit &  
Steamship Co. and Cross-Complaint*

specifically denied, then said answering third party defendant, on the basis of apportionment or responsibility for the alleged occurrence, is entitled to indemnification from the judgment over against the aforementioned third party co-defendant, for all or part of any verdict or judgment that plaintiff may recover against said answering third party defendant.

SEVENTH: That by reason of this action, said answering third party defendant has been and will be put to costs and expenses including attorneys fees.

WHEREFORE, third party defendant, Standard Fruit & Steamship Co. demands judgment dismissing the third party complaint against it, together with the costs and disbursements of this action, and further demands that in the event said answering third party defendant is found liable to plaintiff herein, then said answering third party defendant, on the basis of apportionment of responsibility, have judgment over against the aforementioned third party co-defendant for all or part of the verdict or judgment that plaintiff may recover against said answering third party defendant, together with the costs and disbursements of this action, and for any expenses incurred by it in the defense thereof, including the attorneys fees.

Dated: Brooklyn, New York  
September 11, 1973

JOHN J. LANGAN Esq.  
Attorney for Third Party Defendant—  
Standard Fruit & Steamship Co.  
175 Remsen Street  
Brooklyn, N. Y. 11201  
858-9200

*Answer of Third-Party Defendant Standard Fruit &  
Steamship Co. and Cross-Complaint*

To:

Irving B. Bushlow Esq.  
Attorney for Plaintiff  
26 Court Street  
Brooklyn, N. Y.

Cichanowicz & Callen Esqs.  
Attorneys for Deft./Third  
Party Plaintiff—Oetker  
80 Broad Street  
New York, N. Y.

Bay Ridge Operating Co. Inc.  
Third Party Co-Defendant  
Five World Trade Center  
Suite #7411  
New York, N. Y.

Clerk of Eastern District  
225 Cadman Plaza East  
Brooklyn, N. Y. 11201

PAC 373 L 0086  
bd

**Third-Party Standard Fruit's Answer to Cross-Complaint.**

The third party defendant, Standard Fruit & Steamship Co., by their attorney John J. Langan, Esq., answering the third party cross complaint herein; respectfully alleges upon information and belief:

**FIRST:** Denies any knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraphs designated: Twenty First, Twenty Second, Twenty Third, Twenty Fourth.

**SECOND:** Denies each and every allegation contained in the paragraphs designated: Twenty Seventh, Twenty Eighth, Twenty Ninth.

WHEREFORE, the third party defendant demands judgment dismissing the third party cross complaint herein; together with the costs and disbursements of this action.

Dated: Brooklyn, New York  
April 8, 1974

JOHN J. LANGAN, Esq.

Attorney for Standard

By: .....

A Member of the Firm

175 Remsen Street

Brooklyn, New York, 11201

858-9200

*Third-Party Standard Fruit's Answer to Cross-Complaint*

To:

Kirlin, Campbell & Keating, Esqs.  
Attorneys for Bay Ridge  
120 Broadway  
New York, New York, 10005

Irving B. Bushlow, Esq.  
Attorney for plaintiff  
26 Court Street  
Brooklyn, New York, 11201

Cichanoziez & Callan, Esqs.  
Attorneys for Defts. and  
Third party plaintiff  
80 Broad Street  
New York, New York, 10004

Clerk of the Eastern District  
United States Eastern District  
225 Cadman Plaza East  
Brooklyn, New York, 11201

Our file # PAC 373 L 00086  
ls

**Third-Party Defendant Bay Ridge Operating Co., Inc.'s  
Reply to Cross-Claim.**

Bay Ridge Operating Co., Inc., a third party defendant herein, by its attorneys, Kirlin, Campbell & Keating, replying to the cross claim against it by third party co-defendant, Standard Fruit & Steamship Co., alleges, upon information and belief, as follows.

**FIRST:** It denies each and every allegation contained in paragraph numbered Sixth of the cross-claim of third party defendant, Standard Fruit & Steamship Co.

**SECOND:** It denies each and every allegation contained in paragraph numbered Seventh of the cross-claim of third party defendant, Standard Fruit & Steamship Co.

WHEREFORE, third party defendant, Bay Ridge Operating Co., Inc., demands judgment dismissing the third party complaint and the cross-claim of third party defendant, Standard Fruit & Steamship Co., herein, together with the costs, disbursements of this action and the legal fees and expenses incurred by it in the defense of this action; or in the event that third party defendant, Bay Ridge Operating Co., Inc., be adjudged liable to any party herein, third party defendant, Bay Ridge Operating Co., Inc., then demands judgment over and against the third party plaintiff, the plaintiff, and third party defendant, Standard Fruit & Steamship Co., or any of them, for the full amount of any judgment which may be rendered against it, together with expenses and legal fees, and the costs and disbursements of this

*Third-Party Defendant Bay Ridge Operating Co., Inc.'s  
Reply to Cross-Claim*

action, and that the Court grant to this third party defendant, Bay Ridge Operating Co., Inc., such other, further and different relief as the justice of the cause may require.

Dated: New York, New York  
September 19, 1973.

KIRLIN, CAMPBELL & KEATING  
By ROBERT P. HART  
A Member of the Firm  
Attorneys for Third Party Defendant  
Bay Ridge Operating Co., Inc.  
Office & P. O. Address  
No. 120 Broadway  
New York, New York 10005

To:

Irving B. Bushlow, Esq.  
Attorney for Plaintiff  
26 Court Street  
Brooklyn, New York 11201

Cichanowicz & Callen, Esqs.  
Attorneys for Defendant &  
Third Party Plaintiff  
80 Broad Street  
New York, New York 10004

John J. Langan, Esq.  
Attorney for Third Party Defendant  
Standard Fruit & Steamship Co.  
175 Remsen Street  
Brooklyn, New York 11201

**Answer of Third-Party Defendant Bay Ridge Operating Co., Inc., to Amended Complaint.**

Third Party Defendant, Bay Ridge Operating Co. Inc., by its attorneys, Kirlin, Campbell & Keating, answering the Amended Complaint herein, alleges, upon information and belief, as follows:

**FIRST:** It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered First of the amended complaint.

**SECOND:** It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Second of the amended complaint.

**THIRD:** It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Third of the amended complaint.

**FOURTH:** It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Fourth of the amended complaint.

**FIFTH:** It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Fifth of the amended complaint.

**SIXTH:** It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Sixth of the amended complaint.

**SEVENTH:** It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Seventh of the amended complaint.

*Answer of Third-Party Defendant Bay Ridge Operating Co., Inc., to Amended Complaint*

EIGHTH: It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Eighth of the amended complaint.

NINTH: It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Ninth of the amended complaint.

AS AND FOR A FIRST DEFENSE

TENTH: The amended complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND DEFENSE

ELEVENTH: If plaintiff sustained any injuries and/or illnesses as alleged in the amended complaint, said injuries and/or illnesses were caused in whole or in part by the plaintiff's own negligence and were not caused or contributed to in any manner by any negligence of this third party defendant, Bay Ridge Operating Co., Inc.

WHEREFORE, the third party defendant, Bay Ridge Operating Co., Inc., demands that the amended complaint be dismissed with costs and that the Court grant

*Answer of Third-Party Defendant Bay Ridge Operating  
Co., Inc., to Amended Complaint*

to said third party defendant such other, further and different relief as the justice of the cause may require.

Jul 27 1973

KIRLIN, CAMPBELL & KENTING

By ROBERT P. HART

A Member of the Firm

Attorneys for Third Party Defendant

Bay Ridge Operating Co., Inc.

Office & P. O. Address

No. 120 Broadway

New York, New York 10005

To:

Irving B. Bushlow, Esq.

Attorney for Plaintiff

No. 26 Court Street

Brooklyn, New York 11201

Cichanowicz & Callan, Esqs.

Attorneys for Defendant and

Third Party Plaintiff

No. 80 Broad Street

New York, New York 10004

**Bay Ridge's Answer to Third-Party Complaint,  
Counterclaim and Cross-Claim.**

Bay Ridge Operating Co., Inc., a third party defendant herein, by its attorneys, Kirlin, Campbell & Keating, answering the complaint of the third party plaintiff, alleges, upon information and belief, as follows:

**AS TO THE FIRST CAUSE OF ACTION**

**FIRST:** It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered First of said third party complaint.

**SECOND:** It admits the allegations contained in paragraph numbered Second of the third party complaint.

**THIRD:** It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Third of said third party complaint.

**FOURTH:** It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Fourth of said third party complaint.

**FIFTH:** It admits the allegations contained in paragraph numbered Fifth of said third party complaint.

**SIXTH:** It admits the allegations contained in paragraph numbered Sixth of said third party complaint.

**SEVENTH:** It denies each and every allegation contained in paragraph numbered Seventh of said third party complaint.

**EIGHTH:** It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Eighth of said third party complaint.

*Bay Ridge's Answer to Third-Party Complaint,  
Counterclaim and Cross-Claim*

AS TO THE SECOND CAUSE OF ACTION

NINTH: Third party defendant, Bay Ridge Operating Co., Inc., repeats and reiterates each and every answer and denial contained in paragraphs numbered First to Eighth inclusive of its Answer to the Third Party Complaint with the same force and effect as though fully set forth at length herein and, in addition thereto, alleges as follows:

TENTH: It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Tenth of said third party complaint.

ELEVENTH: It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Eleventh of said third party complaint.

TWELFTH: It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Twelfth of said third party complaint.

THIRTEENTH: It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Thirteenth of said third party complaint.

FOURTEENTH: It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Fourteenth of said third party complaint.

FIFTEENTH: It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Fifteenth of said third party complaint.

*Bay Ridge's Answer to Third-Party Complaint,  
Counterclaim and Cross-Claim*

SIXTEENTH: It denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph numbered Sixteenth of said third party complaint.

**AS AND FOR A FIRST DEFENSE**

SEVENTEENTH: The third party complaint fails to state a claim upon which relief can be granted.

**AS AND FOR A SECOND DEFENSE**

EIGHTEENTH: If third party plaintiff sustained any damages as alleged in the third party complaint, said damages were caused in whole or in part by third party plaintiff's own negligence and were not caused or contributed to in any manner by any negligence of third party defendant, Bay Ridge Operating Co., Inc.

**AS AND FOR A THIRD DEFENSE**

NINETEENTH: If third party plaintiff sustained any damages as alleged in the third party complaint, said damages were caused in whole or in part by third party plaintiff's own gross negligence and/or by its own deliberate acts or defaults and its failure to furnish third party defendant, Bay Ridge Operating Co., Inc., a safe and seaworthy vessel.

**AS AND FOR A COUNTERCLAIM AGAINST THE DEFENDANT AND THIRD PARTY PLAINTIFF, THIRD PARTY DEFENDANT, BAY RIDGE OPERATING CO., INC., FURTHER ALLEGES, UPON INFORMATION AND BELIEF, AS FOLLOWS:**

TWENTIETH: That if third party defendant, Bay Ridge Operating Co., Inc., be adjudged liable herein to

*Bay Ridge's Answer to Third-Party Complaint,  
Counterclaim and Cross-Claim*

the third party plaintiff, which liability is expressly denied, such liability will have been brought about and caused, in whole or in part, by the active and affirmative negligence and fault of the third party plaintiff and by the breach by said third party plaintiff of both the express and implied terms of its contract with third party defendant, Bay Ridge Operating Co., Inc., and also by the breach by the third party plaintiff of the warranty of seaworthiness which it owed to third party defendant, Bay Ridge Operating Co., Inc.; and that by reason of the foregoing, the said third party plaintiff is obligated to indemnify third party defendant, Bay Ridge Operating Co., Inc., for an amount equal to the extent that any liability on the part of third party defendant, Bay Ridge Operating Co., Inc., was caused, brought about or contributed to by the said third party plaintiff, together with the costs and disbursements of this action, including a reasonable amount for counsel fees.

AS AND FOR A CROSS COMPLAINT OVER AND AGAINST THIRD PARTY DEFENDANT, STANDARD FRUIT & STEAMSHIP CO., THIRD PARTY DEFENDANT, BAY RIDGE OPERATING CO., INC., ALLEGES, UPON INFORMATION AND BELIEF, AS FOLLOWS:

TWENTY-FIRST: That at all the times hereinafter mentioned, third party defendant, Bay Ridge Operating Co., Inc., was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York with an office at No. Five World Trade Center, Suite No. 7411, in the Borough of Manhattan, City and State of New York.

TWENTY-SECOND: That at all times hereinafter mentioned, third party defendant, Standard Fruit & Steamship Co., was and still is a corporation with an office and place of business at Pier 42, East River, in the Borough of Manhattan, City and State of New York.

*Bay Ridge's Answer to Third-Party Complaint,  
Counterclaim and Cross-Claim*

TWENTY-THIRD: That third party defendant, Bay Ridge Operating Co., Inc., has been served with a summons and third party complaint by the third party plaintiff in this action, naming as third party defendants Bay Ridge Operating Co., Inc. and Standard Fruit & Steamship Co., a copy of which third party complaint is hereto annexed.

TWENTY-FOURTH: That some time prior to January 15th, 1970, Standard Fruit & Steamship Co. agreed to and undertook to provide the SS Polarstein with safe, proper, fit and seaworthy equipment and tools needed for the proper discharge of bananas from said vessel.

TWENTY-FIFTH: That on January 15th and January 16th, 1970, third party defendant, Standard Fruit & Steamship Co., supplied the SS Polarstein with the necessary materials and the conveyor equipment and tools needed for the discharge of bananas from said vessel.

TWENTY-SIXTH: That on January 15th and January 16th, 1970, third party defendant, Standard Fruit & Steamship Co., owned the aforementioned necessary materials and conveyor equipment and tools needed for the discharge of bananas from said vessel.

TWENTY-SEVENTH: That third party defendant, Standard Fruit & Steamship Co., negligently, carelessly and recklessly failed to supply reasonably safe, proper, fit and seaworthy materials and conveyor equipment and tools needed for the discharge of bananas from said vessel, but, instead, negligently, carelessly and recklessly supplied defective, improper, unfit, unsafe and unseaworthy material and conveyor equipment and tools needed for the discharge of bananas from said vessel.

TWENTY-EIGHTH: That if plaintiff were injured as alleged in the complaint, which is expressly denied, then

*Bay Ridge's Answer to Third-Party Complaint,  
Counterclaim and Cross-Claim*

said injuries were brought about and caused by the sole active and affirmative negligence, carelessness and recklessness and/or omissions on the part of the third party defendant, Standard Fruit & Steamship Co., without the third party defendant, Bay Ridge Operating Co., Inc., contributing in any manner thereto.

TWENTY-NINTH: That if third party plaintiff recover judgment against third party defendant, Bay Ridge Operating Co., Inc., by reason of the premises set forth in the complaint, such liability will have been caused and brought about by the sole and affirmative negligence, carelessness and recklessness and/or omissions on the part of third party defendant, Standard Fruit & Steamship Co., without any active or affirmative negligence, carelessness or recklessness and/or omissions on the part of third party defendant, Bay Ridge Operating Co., Inc., contributing thereto, by reason of which Bay Ridge Operating Co., Inc. will be entitled to recover over against Standard Fruit & Steamship Co. as a third party beneficiary of the agreement between third party plaintiff and third party defendant, Standard Fruit & Steamship Co.

WHEREFORE, third party defendant, Bay Ridge Operating Co., Inc., demands judgment dismissing the third party complaint herein, together with the costs, disbursements of this action and the legal fees and expenses incurred by it in defense of this action; or in the event that third party defendant, Bay Ridge Operating Co., Inc., be adjudged liable to any party herein, third party defendant, Bay Ridge Operating Co., Inc., then demands judgment over and against the third party plaintiff, the plaintiff, and the third party defendant, Standard Fruit & Steamship Co., or any of them, for the full amount of

*Bay Ridge's Answer to Third-Party Complaint  
Counterclaim and Cross-Claim*

any judgment which may be rendered against it, together with expenses and legal fees, and the costs and disbursements of this action, and that the Court grant to this third party defendant, Bay Ridge Operating Co., Inc., such other, further and different relief as the justice of the cause may require.

Jul 27 1973

KIRLIN, CAMPBELL & KEATING  
By ROBERT P. HART  
A Member of the Firm  
Attorneys for Third Party Defendant,  
Bay Ridge

120 Broadway  
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To:

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Third Party Plaintiff  
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**Excerpts From Transcript.**

(6) Thereupon MICHAEL CASTELLANO, the plaintiff, to maintain the issues on his part to be maintained, was examined and testified upon his oath as follows:

*Direct Examination by Mr. Bushlow:*

Q. Mr. Castellano, what is your occupation? A. Electrician.

Q. By whom are you employed? A. United Terminal.

The Court: I can barely hear you.

Q. You have got to speak up, Mr. Castellano, the people won't be able to hear you. (7) A. United Terminal.

Q. What pier do you work on now, Mr. Castellano? A. Pier 42.

Q. Please speak up, Mr. Castellano, so these people— A. Pier 42, East River, New York.

Q. On January 15, 1976, by whom were you employed? A. Bay Ridge Operating.

Q. At the same place?

The Court: I didn't hear you.

Mr. Cichanowicz: Bay Ridge Operating Company.

The Court: Bay Ridge Operating Company. Where are they located?

The Witness: At that time?

The Court: See, that lady down there, yell at her. Bay Ridge Operating Company, where are they located?

The Witness: Pier 42, East River, New York.

Q. (By Mr. Bushlow) Is that the same place that you are working now, same pier? A. Yes.

Q. And is that a specialized pier, Mr. Castellano, certain type of cargo come into that pier only? A. Yes.

Q. What kind of cargo, Mr. Castellano? A. Bananas, pineapples, coconuts.

*Michael Castellano, Plaintiff, Direct*

(8) Q. Is that pier specifically set up with certain types of machinery to handle this kind of cargo? A. Yes.

Q. Now on January 15, 1970, what time did you go to work? A. 7 A. M.

Q. In the morning? A. Yes.

Q. What was your duty that day, what were you supposed to do? A. Electrician.

Q. Did you have to work on the dock or on the vessel? A. On the vessel.

Q. What did you have to do on the vessel? A. 7 A. M., start to get the power line.

Q. Take-up loader? A. When I start, 7 A. M., I suppose to get all the power line ready and board the ship until 8 o'clock when the longshoremen comes in.

The Court: I can't hear you, sir. At 7 o'clock you are supposed to get your power line and what else?

The Witness: Get ready before 8 o'clock, all the longshoremen come to work.

The Court: All right. Can you hear it?

(9) A Juror: Very hardly.

The Court: Do you want the jury to hear you or don't you?

Mr. Bushlow: Judge, is there a microphone available?

The Court: I don't have one. You can talk louder than that.

Q. (By Mr. Bushlow) Where did the power line come from, Mr. Castellano? A. From the dock.

Q. Where did you bring them to? Where did you take them to, the power line? A. On board the ship, number two.

Q. Now just what type of equipment were you going to work with or hook up? A. Well, pick up gear box, deck men, they pick them up from the pier.

*Michael Castellano, Plaintiff, Direct*

Mr. Sergi: Can we have it read back, please.

The Court: Read that last answer.

(Whereupon the pending question and answer was read back by the Reporter.)

Q. (By Mr. Bushlow) How many types of electrical equipment are used on the vessel for the discharge of bananas? A. Well, lots of different kinds of gear.

Q. Now tell us what kind were used that day, January (10) 15, 1970. A. We got rope wire, 200 feet long, we got up on the dock, bring it back on the ship, go down the hole, each deck where we work. Got electrical cardinals, got foot switches, other—

Q. Now, what do you hook up first? What's after you get your power lines on board the vessel? What type of gear do you hook up first? A. Once I got my power line on the ship, I'll stand by the first machine in A deck.

Q. What kind of machine is that on the A deck that you are talking about? A. It's a conveyor.

Q. Conveyor machine? A. Yes.

Q. Where did that go from that deck to what deck? A. First we start to put some small machines, one got a little opening, then put a bigger machine from A to B deck.

Q. You say once they got the opening. How do they get the opening? A. Well, once A, it's locked, the long-shoreman goes down. C deck may be five times bigger than this room, start taking two, three thousand cartons out, they got room to put small machinery in. Once this deck almost complete, they put (11) in a big machine from A to go next to B deck.

Q. Now what kind of machine is this that goes from the A deck to the B deck? A. Conveyor, electric conveyor.

Q. What do you have to do to that electrical conveyor? A. Once the deckmen pick up the machine and

*Michael Castellano, Plaintiff, Direct*

set it in place, I carry my electrical line downstairs, I plug it in, I make sure the machine running.

Q. Now do you have anything to do with bringing that equipment on board the ship? A. No.

Q. Do you have anything to do with bringing that equipment from the deck of the ship down into the hole? A. No.

Q. Do you have anything to do with the placing of that equipment from the A deck to the B deck? A. No.

Q. When do you come in and put your electrical power in; where is that piece of equipment? A. I have a machine. Once they finish completing the machine, I go down and connect.

Q. You just give the machine the electrical power to work; is that right? A. Right.

(12) Q. Now, on this machine going from the A deck from the B deck to the A deck, where are the controls on that machine?

Are they on the B deck or are they on the A deck?  
A. On the A deck.

Q. Now will you please describe to the jury what type of a control these machines have to make them go or make them stop. A. They got little boxes about this size.

Q. Speak louder now. A. Boxes about this size. (Indicating)

They got front or reverse switch. You plug a little extension cord, plug a motor in the machine and put it into the switch. A regular foot switch.

Q. You say there is a foot switch? A. Right.

Q. Now, what is on this, is the foot switch on when it is pressed down or when it is up? A. When it is pressed down.

Q. And if you take your foot off the switch, the foot switch, what happens? A. She stops.

*Michael Castellano, Plaintiff, Direct*

Q. Now during this operation, is it necessary that there be a man at that foot switch? A. Yes.

Q. At all times to keep it down? (13) A. Yes.

Q. Now besides this machine going from the B deck to the A deck, are there any other types of equipment on the B deck? A. Yes.

Q. To feed into the machine? A. Yes.

Q. What kind of equipment is there? A. Once you put a machine from A to B, assume the B deck now got to go to C deck.

So they put it on a 90 degree angle, rolls maybe five foot.

Q. Talk up, Mr. Castellano. A. Once they got the machine straight down C, A to B.

Q. Right. A. From then they clean the B deck, they got rollers, 90, 45, to go all around to come in for the next machine, they go to the C deck.

Q. Now when they put the machine down from now, from the B deck to the C deck? A. Yeah.

Q. Is the B deck clean of bananas? A. Once they set the machine it's not. Maybe half hour's work. They set up the machine, maybe a half hour before (14) they finish that deck.

Q. Then? A. As soon as they finish they go down.

Q. Then the longshoremen go down? A. To the next deck.

Q. Now do any of the longshoremen remain on the B deck when this one is—when they are working on the C deck? A. Yes.

Q. How many men remain on the B deck? A. Two.

Q. Now let's see what they do. What does one man do, where is he standing? A. One man after the machine comes from B to C—

The Court: I don't understand.

The Witness: One man up from the machine, comes from C deck to B deck. When the bananas arrive they

*Michael Castellano, Plaintiff, Direct*

make the turn, let the other machine go to A deck, one man is straight under the conveyor, they go up.

Q. (By Mr. Bushlow) Let me see if I understand you correctly, Mr. Castellano.

When they finish the B, deck men now working on the C deck, taking up the boxes of bananas, you say two men remain on the B deck?

Q. One man is at the machine? A. Yes.

(15) Q. Which brings up the cartons from the C deck to the B deck? A. Yes.

Q. And then you say it goes around rollers and goes over to a conveyor that goes from the B deck to the A deck? A. Yes.

Q. And you say that there is a man there? A. Yes.

Q. And again that it is his job to straighten the boxes out so they get on this conveyor in a straight way, so they can go up; is that correct? A. Yes.

Q. What happens when they finish the C deck? A. They go down to D deck

Q. And do they go through the same operation? A. Yes.

Q. And how many men now are left on the C deck? A. Two men.

The Court: How many? Wait a minute, how many?

The Witness: Two.

Q. (By Mr. Bushlow) Are there still two men on the B deck? A. Yes.

Q. Still two men on the A deck? A. Yes.

(16) Q. The rest of the men are down now on the D deck? A. Yes.

Q. Now, you had an accident that day; isn't that right? A. Yes.

Q. About what time did your accident happen? A. Around 10:30.

Q. At night? A. Yes.

*Michael Castellano, Plaintiff, Direct*

Q. Where were you at the time your accident happened? A. I was in the D deck hatch number two.

Q. Hatch two?

Mr. Sergi: D deck.

Mr. Bushlow: D deck.

Q. (By Mr. Bushlow) Mr. Castellano, how long had you been working as an electrician on banana boats? A. Twenty years.

Mr. Cichanowicz: I didn't hear that.

Mr. Bushlow: Twenty years.

Q. (By Mr. Bushlow) When bananas—when you first started to work, as an electrician on banana boats, can you tell me in what fashion, how did the bananas come into your country?

Mr. Sergi: Objection, irrelevant, immaterial.

The Court: Sustained.

(17) Q. (By Mr. Bushlow) Can you tell me, did the bananas come in twenty years ago in boxes?

Mr. Sergi: Objection.

The Court: I don't see what relevancy, Mr. Bushlow.

Mr. Bushlow: Just want to show the type of equipment, your Honor.

The Court: I don't see the relevancy to this. We are concerned with this equipment, this equipment alone.

Q. (By Mr. Bushlow) Now, the equipment that you were using, this equipment that you hooked up, how long had you been working with that particular equipment?

Mr. Sergi: Objection on that day, your Honor.

Mr. Bushlow: On that day.

Mr. Sergi: Withdraw the objection.

*Michael Castellano, Plaintiff, Direct*

Q. (By Mr. Bushlow) For how long, for how long? A. Since I remember.

Q. About how long? A. About fifteen years.

Mr. Ciehanowicz: I don't think—

Mr. Sergi: I move to strike the answer.

The Court: The answer is stricken. How long on that particular day had you been using this equipment, working with this equipment on January 15th, 1970.

Mr. Bushlow: I will withdraw the question, your (18) Honor. I will see if I can rephrase it.

Q. (By Mr. Bushlow) This equipment that you used on January 15, 1970, had you used that equipment at any time before this accident?

Mr. Sergi: Objection.

The Court: I will allow the answer to that question.

A. Yes.

Q. (By Mr. Bushlow) For how long before this accident had you used that equipment? A. About ten years.

Mr. Sergi: Object, move to strike it, your Honor. We are concerned with what happened on this day.

The Court: I will allow the answer to that question to stand.

Mr. Ciehanowicz: The question was on this day, how long.

The Court: I know the original question was, but I don't see any harm in the way it was phrased the last time.

Q. (By Mr. Bushlow) Now, Mr. Castellano, on January 15, 1970, how were the bananas stowed in the ship? Were they loose or were they packaged?

*Michael Castellano, Plaintiff, Direct*

Mr. Sergi: Object unless he observed it before they started discharging this cargo.

(19) The Court: You have to lay some foundation.

Q. (By Mr. Bushlow) Mr. Castellano, at 7 o'clock in the morning or before they started the discharge, the cargo, did you see—do you know how the bananas were packaged? A. Yes.

Q. How were they packaged? A. In boxes.

Q. Had you worked on bananas prior to January 15, 1970?

Mr. Sergi: Object.

The Court: No, I will allow it.

A. Yes.

Q. (By Mr. Bushlow) Had you worked on bananas that were packaged in boxes for January 15, 1970?

Mr. Sergi: Object, your Honor. Is he talking about as an electrician or discharging it manually?

The Court: As an electrician, he's always been an electrician.

Mr. Sergi: No objection.

A. Yes.

Q. (By Mr. Bushlow) Now this day, January 15, 1970, did you actually see the type of boxes that these bananas were in? A. Yes, sir.

Q. And do you recall, did those boxes have a name? (20) A. Yeah, they got a couple of different names.

Q. What name did you know these boxes by? A. At the time, Cabana.

The Court: Cabana boxes? C-a-b-a-n-a?

Mr. Bushlow: Yes, your Honor.

The Witness: Had Sula.

*Michael Castellano, Plaintiff, Direct*

Mr. Bushlow: S-u-l-a, your Honor.

The Court: S-u-l-a boxes, they were two types, Cabana and Sula boxes.

What's the difference?

Mr. Bushlow: That's what I'm going to ask him now.

Q. (By Mr. Bushlow) What is the difference in these boxes? A. The Cabana boxes are the same amount of pounds of bananas in there.

The Court: I can't hear you.

The Witness: The Cabana is the same amount of pounds of bananas, forty-two to forty-five pounds but they were a little long and a little shorter.

The Sula—

Mr. Sergi: Objection.

Mr. Bushlow: Let's take the last measurement.

The Court: He says a little longer, a little shorter.

(21) The Witness: The Sula box was a little high, shorter.

The Court: A little longer and a little shorter. Two inconsistent statements, I don't follow you, you mean a little longer, less wide?

The Witness: Same width.

The Court: Same width?

The Witness: Yeah.

The Court: A little taller?

The Witness: Yeah, high.

The Court: Cabana boxes taller than shallower?

The Witness: Cabana shallower and longer.

The Court: I see. Sula boxes were taller?

The Witness: High.

The Court: Okay.

*Michael Castellano, Plaintiff, Direct*

Q. (By Mr. Bushlow) Now, could you give us an approximation of what you saw, how long was the Cabana box about? A. The Cabana is about, around 21 inches longer.

Q. How wide? A. 15 inches wide.

Q. How high? A. Nine and a half inches high.

Q. That's the Cabana. Now what about the Sula box, how long was the Sula box? (22) A. Approximately—it measure—because I never measured, about 18 inches long.

Q. How wide was it? A. About 14 and a half, 20, 15 inches.

Q. How high was it? A. Roughly about 11 and a half to 12 inches.

Q. Now this equipment that you were using, on January 15, 1970, can you tell us—and I will start from the D deck to the C deck. This conveyor belt.

Were there any sides on the conveyor belt? A. Yes.

Q. Were these sides moveable or stationary? A. Some moveable, some stationary.

Q. And how high were these sides on the conveyor belt from the C deck, from the D deck to the C deck? A. Around four inches.

Q. Let's go to the C deck, to the B deck. Were there any sides on that conveyor? A. The same, yes.

Q. How high were these sides? A. Around, roughly, four inches. Little less, not more.

Q. Now from the B deck to the A deck on that conveyor, did that have any sides on it? A. Yes.

(23) Q. And were these sides collapsible or flippable or—A. Stationary.

Q. They were stationary? A. Stationary.

The Court: Is that true of all of the sides?

Q. (By Mr. Bushlow) On either side or one side?

The Court: No, no. Is that true of all sides between every deck, they were all stationary?

*Michael Castellano, Plaintiff, Direct*

The Witness: No.

The Court: No, all right. Just from the B to the A deck?

The Witness: From A to B.

Q. (By Mr. Bushlow) How high were these rails from A to B? A. Around three inches.

Q. Now, were you a longshoreman when they first began to import bananas in cartons? Were you working on the banana boats when they first started boxing bananas? A. Yes.

Q. I think you testified the equipment you were using that day was the same equipment you used then; is that right? A. Yes.

Q. Now, when they first started with the bananas, can you tell us what kind of box they used for the bananas?

(24) The dimensions of the box.

Mr. Sergi: When is this?

The Court: This is when—some 10 to 15 years ago, I take it?

Q. (By Mr. Bushlow) What were the dimensions of the box? A. Around 23 inches long, 15 inches wide, 8 inches high.

Q. In the 15 years or so that you were using this equipment for boxing bananas, did they ever change the height of the rails on the C deck to the D deck, the B deck to the A, or—

Mr. Cichanowicz: Can we have clarification of who is "they"?

Q. (By Mr. Bushlow) What were the rails, the height of the rails ever change? A. No.

Mr. Cichanowicz: By whom?

Mr. Bushlow: By anybody.

Mr. Sergi: Not anybody, only parties to this action, your Honor.

*Michael Castellano, Plaintiff, Direct*

The Court: Wait a minute, wait a minute. He says never changed, always been the same.

Mr. Sergi: Has he always worked for the same party?

(25) The Court: But he's never seen anything different, that's what he's saying; isn't that right?

Mr. Sergi: Do we know he always worked for the same party for 15 years?

Q. (By Mr. Bushlow) Did you work at the same place for 15 years? A. No.

Q. Where did you work? How long have you been working at Pier 42? A. Five years.

Q. Where did you work before that? A. Pier 13, East River.

Q. Where is Pier 13 as associated with Pier 42; are they close to each other? A. Yes.

Q. And at that time was Pier 42 being used for banana boats? A. No.

Q. Was Pier 14? A. Yes.

Q. What happened to Pier 13? A. They closed down, move on Pier 42.

Q. What's in Pier 13 now? A. Nothing.

Q. Is there any— (26) A. A tennis club.

Q. All right. So, when they closed down Pier 13, they moved over to Pier 42; is that right? A. Yes.

Q. Now what equipment was used at Pier 13? Was it the same equipment they moved over to Pier 42? A. Yes.

Q. How long have you been working with this equipment? A. Since they started boxes, around 1960, '61.

Q. In all that time, were the rails on this conveyor as you testified from the D deck to the C deck, B, three or three and a half, four inches high?

The Court: Four inches, he said.

*Michael Castellano, Plaintiff, Direct*

Q. (By Mr. Bushlow) And the rails were on the C deck to the B deck on this conveyor; were they about four inches high? A. Roughly, give or take an inch, I didn't measure.

Q. From the B deck to the A deck, was that always a stationary rail and immovable rail about three inches high? A. Yes.

Q. Now, during the course of your work, as an electrician, a maintenance man, did the size of the banana boxes change during all these years? A. Yes.

Q. How long had you been working with what you call (27) the Sula box before this accident? A. Six, seven months.

Q. Is the Sula box still being used? A. No.

Mr. Sergi: Objection.

The Court: Sustained. Strike it out, disregard it.

Q. (By Mr. Bushlow) Are you working now? A. Yes.

Q. You are working on banana boats? A. No.

Q. What are you doing now? A. I'm an electrician on a dock.

The Court: I didn't catch that.

Mr. Bushlow: Electrician on the dock.

Q. (By Mr. Bushlow) When you are on the dock, do you see the boxes of bananas that come off the vessels?

The Court: No, Mr. Bushlow, what you are doing today is irrelevant.

Q. (By Mr. Bushlow) Now, at about 10:30 that night, you said you were on the D deck? A. Yes.

Q. What were you doing? A. Electrical feeders, only time they got to move a machine from one place to another, they call for the electrician. (28) So they told me to disconnect that machine, they got to move from one place to another.

*Michael Castellano, Plaintiff, Direct*

Q. When they call you, do they call you to move the machine or to disconnect the machine? A. No, to disconnect the machine.

Q. Did you disconnect the machine? A. Yes.

Q. Well, will you please tell the jury, the Court and jury, what happened. Now, speak up, please. A. When I went down to D deck—

The Court: Went down to what deck?

The Witness: D deck, the last deck, to disconnect the machine. So I was bent down, pull the plugs out, get myself ready, I start picking the stuff, I got up, I got hit on the head, so I started to go down.

A couple of guys grab me, next thing I know I'm laid down on the wheel of the ship.

Q. (By Mr. Bushlow) Tell me, were these cartons of bananas, were they wooden or were they cardboard? A. Cardboard.

Q. What happened to you after that when you say you found yourself in the wings of the ship? How long did you stay there? A. Ten minutes, fifteen minutes.

(29) Q. Where did you go after that? A. Couple of guys help, he come up through a ladder to the time-keeper.

Q. Where did you go after that? A. Some dock boys with a car took me to Columbus Hospital.

Q. Did you go to the hospital? A. Yes.

Q. What did they do for you at the hospital? A. Gave me emergency treatment.

The Court: I can't hear you. They X-rayed you?

The Witness: Examined me.

The Court: Examined you.

A. Gave me some pills. Told me to go home.

Q. (By Mr. Bushlow) About how long would you say you were out at the Emergency Room? A. About three hours.

*Michael Castellano, Plaintiff, Direct*

Q. Was anybody there with you? A. Yes.

Q. Who was with you? A. My father.

Q. Is your father working with you? A. Yes.

Q. Is he an electrician?

(42) Q. Mr. Bushlow: I'm not making—

Mr. Sergi: Wait a minute, let me finish.

The Court: The sole question, did he have occasion to observe. I don't know what's coming next. There is certainly no harm in asking that.

Mr. Sergi: I withdraw my objection to that question.

Q. (By Mr. Bushlow) Did you have occasion to see how the longshoremen discharges these boxes? A. Yes.

Q. And did you have occasion to see—and let's take the C deck, if the man who was not on the starter, the other man was missing, what would happen to the boxes as they went from the C deck to the B deck?

Mr. Sergi: Object.

The Court: Sustained.

Q. (By Mr. Bushlow) Did you see that?

The Court: Sustained. Not without some foundation, Mr. Bushlow.

Q. (By Mr. Bushlow) As I understand your testimony, Mr. Castellano, you testified that—and we'll take the C deck, when the C deck was clean, they left two men up on the C deck; is that right? A. Yes.

Q. And all the rest of the men except for two (43) men on the B, the two men on the A, the rest went down to the D deck and do the unloading.

And you testified that the job of one man was to stand at the starter?

*Michael Castellano, Plaintiff, Direct*

The Court: Mr. Bushlow, Mr. Bushlow.

Mr. Sergi: Object, your Honor.

The Court: We've been over this once.

Q. (By Mr. Bushlow) Well, did you testify to the duties of the two men who were left on the C deck?

Mr. Sergi: Object, already been answered.

The Court: Already answered it. We are not going to get in what I ruled on. You couldn't get in by an indirect method.

Mr. Bushlow: I just want his observations, your Honor, which I think he's entitled to state.

The Court: Anything he saw on that date, he can state, but not anything he might speculate on.

Mr. Bushlow: No, I'm not going to ask him that.

Q. (By Mr. Bushlow) Now, on that day now, did you have occasion to notice whether a man was missing on the B deck as the cartons were going up out of the ship?

Mr. Cichanowicz: At what time of day?

The Court: Sustained.

Q. (By Mr. Bushlow) At any time during the day.

(44) Mr. Cichanowicz: I object.

The Court: Sustained.

Mr. Bushlow: May we discuss this, your Honor, out of the jury's presence.

The Court: Ladies and gentlemen, we will adjourn for this evening and resume tomorrow morning at 10 o'clock. Tomorrow morning when you come in, report to the jury room at about quarter to 10 or you won't get paid. That is important.

Then come up here. The Clerk will show you where you come in the back door, where you go in the jury room and assemble in the jury room. We should start as close to 10 as possible.

*Michael Castellano, Plaintiff, Cross*

As I can start tomorrow morning, be here promptly. All of you stay, we'll see you tomorrow morning. Don't discuss the case.

(Whereupon the jury leaves the courtroom at 4:30 for the day, and the following proceedings are had in their absence:)

The Court: Gentlemen, when are you going to give Request to Charge?

Mr. Bushlow: I may have my request tomorrow.

The Court: What about you, Mr. Hart?

Mr. Ciehanowicz: I only have one, I think that's on—

\* \* \*

(52) Q. Mr. Castellano, to get back to these conveyors on the ship, will you tell us what a man has to do to start the conveyor rolling? A. Have to put his foot on the switch.

Q. And where is that switch, near the conveyor? A. Near the conveyor.

Q. When he takes his foot off the switch, what happens? A. The machine stop.

Mr. Bushlow: Thank you.

(53) *Cross Examination by Mr. Sergi:*

Mr. Sergi: With your Honor's permission, may I stand here?

I have a great deal of—

The Court: The only difficulty with that is, that young lady at the far end of the bench may not hear him either. I'm more concerned about her hearing than you hearing. I think if you stand there, Mr. Sergi, she's more apt to hear the answer; if you don't get an answer, keep yelling at him until you do.

*Michael Castellano, Plaintiff, Cross*

Q. Mr. Castellano, do you hear me? A. Yes.

Q. Can you talk as loud as I am speaking now? A. I try.

Q. Make believe you're down in the hold of a ship, you are going to show to your friends this way, everybody will hear what you have to say, all right?

The Court: Mr. Castellano, you just got finished telling us you yelled at the kids. Yell at the kids.

Q. Mr. Castellano, the ratch of the ship where the bananas are stored are like a room; is that right? A. Yes.

Q. They are like this room here? A. Yes.

(54) Q. Only much larger; is that right? A. Yes.

Q. And a deck is like this room only larger? A. Yes.

Q. Is that correct? Now, when they start to discharge the boxes of bananas from an A deck, all they use is the roller; is that right? A. No.

Q. Do they use the conveyors in the first deck? A. Yes.

Q. Now in order to start A deck, they open the doors on the side of the ship? A. Yes.

Q. Like those double doors there, they open? A. Yes.

Q. Longshoremen use those doors and they use the rollers first? A. Yes.

Q. Then do you put conveyors into A deck? A. Yes. Small conveyor.

Q. Small. Now, in A deck, there is an opening in the ceiling; is that right? A. Yes.

Q. And that goes out to the open part of the deck? A. Yes.

(55) Q. And the opening, that is the square; is that right? That's about 50 feet by 20 feet? A. Yes.

Q. Is that correct? Now, in order to put down the conveyor, you've got to open that square in the ceiling? A. They are not open all the way.

*Michael Castellano, Plaintiff, Cross*

Q. Well, they open it? A. Little.

Q. Enough to put down the roller? A. Yes.

Q. And the roller when they are not working are kept in a gear box; is that right? A. Yes.

Q. And the ship has a crane and the crane picks up the conveyor and puts it down in the hatch? A. Yes.

Q. Is that right? And the men who operate the crane and longshoremen— A. Qualified as deckmen.

Q. —they work for Bay Ridge? A. Yes.

Q. Like you work for Bay Ridge? A. Yes.

Q. When the conveyor comes into the hatch, the longshoremen, the people who work for Bay Ridge, they put the (56) conveyor where they want? A. Yes.

Q. Is that right?

The Court: You just nod your head, he gets nothing, you have to answer.

The Witness: Yes.

Q. (By Mr. Sergi) And the men take the boxes from the floor or wherever they can find them and they put it on the conveyor and it goes out? A. Yes.

Q. Is that correct? Now, I show you—

Mr. Sergi: Your Honor, this exhibit is double A, Defense, in evidence. And there are four photographs. May we mark the photographs 1, 2 and 3?

The Court: Yes. 1, 2, 3 and 4.

Mr. Sergi: 1, 2, 3, 4.

(Whereupon four photographs are received and marked Defendant's Exhibit No. 1, 2, 3, and 4 in evidence by the Reporter.)

Q. (By Mr. Sergi) Mr. Castellano, I show you—

The Clerk: Mr. Sergi, could I mark the stamp.

*Michael Castellano, Plaintiff, Cross*

Q. I show you defendant's exhibit double A-4, Mr. Castellano. Do you see a conveyor in that photograph?

A. Yes.

Q. And you see the men working there putting boxes (57) on it? A. Yes.

Q. Is that the way it was done? Is that the way the longshoremen do it?

Mr. Sergi: May I show that to the jury, your Honor, in order to—

The Court: Yes.

Mr. Sergi: —familiarize them with the operation.

Q. Now, Mr. Castellano, who puts the conveyor in the position that they want to use it? A. Longshoremen.

Q. Longshoremen people who work for Bay Ridge? A. Yes.

Q. And they move it whenever they feel that they have to put it somewhere else? A. Yes.

Q. Is that right? And you don't have to go aboard the ship until they start using the conveyors and then you plug in for them; is that correct?

And after you plug in and they start using conveyors, you don't have to stand around and watch, you go somewhere else? A. Yes.

Q. On this ship, they had finished hatch A, B and (58) C, before your accident; before your accident?

Right, I'm sorry, Deck A, B and C.

Now, how many conveyors were in hatch number two between deck A, B, C and D when you were plugging in? A. Six.

Q. Seven? A. Six.

The Court: I'm not clear, Mr. Sergi when you say he was plugging in or when he was unplugging.

Mr. Sergi: Plugging in at the time of the accident.

*Michael Castellano, Plaintiff, Cross*

The Court: All right.

Q. (By Mr. Sergi) You say there were six? A. There were three big ones and three small ones.

Q. And were they all down from D deck to C deck or were they above? A. One was from A to B, the other one from B to C, and the other one to C to D, three small machines on the D deck.

Q. Now all these machines on D deck ran up to C deck; is that right? A. No. Only one from C.

Q. Only one? A. Yes.

Q. What were the other small ones? (59) A. Ones got the machine from C to D. Now, they got small machine, each different direction.

Q. Are those the rollers? A. Besides the rollers, booster, small machine.

Q. Besides the conveyors, were there any rollers down in D deck? A. Yes.

Q. How many rollers? A. I don't know.

Q. At the time that you were in D deck, how many longshoremen were working in D deck?

Mr. Bushlow: If your Honor please, is this at the time of the accident?

Mr. Sergi: I withdraw the question.

Q. (By Mr. Sergi) The conveyor that you were going to disconnect at the time of your accident, you had plugged it in some time before? A. Yes.

Q. Do you remember when you had plugged it in? A. I don't remember.

Q. Some time earlier in the evening? A. Hour, two hours before.

Q. Now when you plugged it in, longshoremen were working in D deck? A. Yes.

(60) Q. How many longshoremen were working in D deck? A. I don't know.

Q. About 25! A. I don't count the men.

*Michael Castellano, Plaintiff, Cross*

Mr. Sergi: Your Honor, I have a copy of an EBT that I'm going to use. I don't have a copy of the other one. Do you have it?

Mr. Hart: Yes.

Mr. Sergi: One taken on July 31st, '73, I don't have an extra copy.

The Court: Sorry, as long as you gentlemen have—I can follow it.

Mr. Hart: Can you?

The Court: Sure.

Q. (By Mr. Sergi) Mr. Castellano, do you remember that you were taken by your lawyer to the office of the other lawyers, they asked you questions? A. No, I don't remember.

Mr. Sergi: I'm making reference to examination January 13, 1974, would you concede Mr. Bushlow that—I withdraw the question, I beg your pardon.

Q. Do you remember that some lawyers came to the office of your lawyer and asked you some questions? A. Yes.

Q. And Mr. Korson was there with you; is that (61) correct? A. Yes.

Q. And there was a man with a machine same as this Reporter here? A. Yes.

Q. He was using that machine, do you remember that? A. Yes.

Q. And the man asked you to raise your right hand?

Mr. Bushlow: Your Honor, I object. I admit that he was examined in my office under oath.

The Court: He's entitled to inquire on cross examination. He's entitled to inquire on cross examination.

*Michael Castellano, Plaintiff, Cross*

Q. (By Mr. Sergi) Do you remember that the man asked you to raise your right hand and asked you if you are going to tell the truth; do you remember that? A. Yes.

Q. You said, "I was going to tell the truth"? A. Yes.

Q. Right. I don't have the original, so, gentlemen, would you concede that he signed this examination before trial?

Mr. Bushlow: Of course.

The Court: I have the original, Mr. Sergi. I have the original and the signature is on here.

Mr. Sergi: Is that the one that's signed, your Honor, may I have him identify his signature?

(62) The Court: Certainly.

Mr. Sergi: Thank you.

Q. (By Mr. Sergi) Mr. Castellano, is that your signature? A. Yes.

Q. And Mr. Bushlow, he took your signature, you swore it was the truth; is that right? A. Yes.

Mr. Sergi: Thank you, your Honor.

Q. Do you remember these questions that were asked on that day?

Mr. Hart: What page?

Mr. Sergi: Page 35 at the top of the page.

Q. (By Mr. Sergi) Do you remember this question, Mr. Castellano: "How many other longshoremen were there just before the time of the accident when you told us they were working above you?"

"Answer, Altogether?"

"Question, Yes."

"Answer, Around 25."

Do you remember the question and do you remember the answer? A. Roughly got around to 25, that's why I say around 25.

*Michael Castellano, Plaintiff, Cross*

Q. So there were about 25 longshoremen working in (63 the D deck at the time of your accident; is that correct? A. I guess, yes.

Q. Don't guess, do you know? A. I can't recall, I don't count them.

Q. You said 25; was that the truth? A. They asked me roughly how many they knew, asked the same question you asked me now. Roughly how many men, around 20, 25.

Q. Let me ask the question again from the examination before trial.

I am going to ask you the exact same question.

"Question, How many other longshoremen were there just before the time of the accident when you told us they were working above you?

"Answer, Altogether?

"Question, Yes.

"Answer, Around 25."

So there were about 25 men working where you had your accident; is that right?

Mr. Bushlow: Just a moment, your Honor. I object to this question. Mr. Sergi's first question was how many men were working on D deck. There is no mention of D deck in this question, your Honor.

The Court: Well, it's for the jury to decide.

Mr. Bushlow: All right.

(64) The Court: If it's inconsistent with anything else he said and he's entitled to ask him those questions—

Mr. Bushlow: Just a moment. He's entitled to ask him these questions, your Honor, but he's not entitled to dispute the answer or to imply anything in the answer, that is not there.

*Michael Castellano, Plaintiff, Cross*

The Court: It's cross examination, Mr. Bushlow. He's entitled to find out what this man's recollection was.

Mr. Bushlow: Absolutely.

Q. (By Mr. Sergi) The 25 men that you spoke of, were they in the same D deck where you had your accident? A. I don't count them, roughly.

I figure the gang is around, 20, 25 men. Two from D deck to the A deck, all of them.

Q. Were these 20, 25 men in the D deck where you had your accident? A. Yes.

Q. And were they there at the time of your accident? A. Yes.

Q. And did they see your accident? A. I guess so.

Q. So there were 20 or 25 men in D deck and you said there was one man on C deck, one man on B deck and one man on A deck?

Mr. Bushlow: Your Honor, he never said any such (65) thing.

Mr. Sergi: That's not a proper objection. I wish he'd stop that, your Honor.

The Court: If Mr. Castellano said there is more than one he did so, he can so testify. Did you say that or was there more than one?

The Witness: I didn't see, there was supposed to be more than one.

Q. (By Mr. Sergi) Did you see them? A. No.

Q. So you don't know how many men were there; is that correct? A. Right.

Q. So when you told your lawyer, Mr. Bushlow, yesterday, that there were two men then, you weren't telling the truth because you never knew how many men were there; is that correct? A. I'll answer that question. They got man each machine when they call me go

*Michael Castellano, Plaintiff, Cross*

downstairs, I see men on the machine. I don't count one, two, three, I go straight down my job.

Q. When you go down to D deck and you are going to pull the plug out, did you know how many men were up on C deck, on B deck or A deck? A. No.

(66) Q. Thank you. How many men are supposed to be at C deck, B deck and A deck? A. Two each deck.

Q. And they were Bay Ridge longshoremen, is that right? A. Yes.

Q. And one man was to operate the pedal to make the conveyor go or stop; is that right? A. Yes.

Q. And the other man was to guide the box after it came up the conveyor onto the roller and rolled it over to the next conveyor; is that right? A. Yes.

Q. One man push the pedal and guide the box and at the same time, can he? A. No.

Q. Now all these boxes were going to go out of the ship on rollers and onto a truck? A. Yes.

Q. Is that right? When the truck is filled and they can't anymore boxes, then they got to stop; is that right? A. No.

Q. They keep pushing the boxes on the roller? A. They gotten trucks on—

(67) Q. When the trucks are filled up do they stop? A. Sometime they do.

Q. And they stop outside on the dock; is that right? A. Yes.

Q. And then they are supposed to stop along the roller; is that right? A. Right.

Q. And then they are supposed to stop down the conveyor; is that right? A. Yes.

Q. From A, B, C, D, all the way down D deck, if they don't stop, they keep coming, what is going to happen? A. Somebody along the line, the box going to jump up.

Q. What? A. Box going to fall down.

Q. Fall off, right? A. Yes.

*Michael Castellano, Plaintiff, Cross*

Q. The ones who were in charge of stopping the operation and not letting the boxes fall off are Bay Ridge stevedores; is that right? A. Yes.

Q. People you work with? A. Yes.

(68) Q. Right. Now, at the time of the accident, you had bent down to pull the plug; is that right? A. Yes.

Q. Were you standing in the opening of the hatch? A. Yes.

Q. Right. And there were three large conveyors going up from D to C deck and they are all moving? A. Yes.

Q. Then you pulled it and something hit you? A. Yes.

Q. Do you know what hit you? A. I felt something hit my head, it was a case of bananas.

Q. Do you know what hit you? A. A case of bananas.

Q. When did you see the case of bananas? A. When I got struck on the head, I see a box fall, I start to fall down.

Q. You saw the box fall? A. After I got hit on the head.

Q. After it hit you on the head, you say it fell on the floor? A. I see something fall down, a box falling alongside of me.

Q. Isn't it true, Mr. Castellano, that after the (69) box hit you as your lawyer, Mr. Bushlow, indicated, you were stunned and you didn't see anything? Isn't that right? A. Once I got hit on the head so I started stumbling, but I see boxes fall in front of me.

Q. There were other boxes there too, they were still working? A. No, that was clean, that area.

Q. And it hit you in the head and you were stunned? A. Yes.

Q. And you looked down and there was a box; is that right? A. It's not that way.

Q. Did you ever, ever see where that box came from before it hit you? A. No.

*Michael Castellano, Plaintiff, Cross*

Q. So you don't know if it came from C deck; is that right? A. Yes.

Q. You don't know if it came from B deck; is that right? A. Yes.

Q. You don't know if it came from A deck; is that right? A. Right.

Q. In fact, you don't know if it came over a (70) conveyor; isn't that correct? A. Right.

Q. You don't know if one of your co-workers dropped it; isn't that correct? Therefore, the difference in the boxes in the size of the box and the size of the rail on the side as far as you know had nothing to do with this accident because you don't know where the boxes came from; isn't that right? A. Right.

Mr. Sergi: I move to strike all that testimony, your Honor, it has nothing to do with this accident from this witness' mouth.

The Court: Now wait a minute.

Mr. Sergi: Wait.

The Court: Wait a minute, Mr. Sergi. Wait a minute. I'll take it subject to connection, this isn't the end of the plaintiff's case.

Mr. Bushlow: If your Honor please, may I ask the Court to tell Mr. Sergi that we are having difficulty with hearing the plaintiff not hearing him. And that he is walking up to the plaintiff and shouting, badgering and harassing him.

The Court: I don't think it's gotten out of hand, but I would appreciate it if you stayed behind.

Mr. Sergi: I certainly don't intend to badger the witness, it's my mode of asking questions.

(71) The Court: Okay, just stay behind the lectern, if you will.

Q. (By Mr. Sergi.) Now, you have worked from 7 o'clock in the morning until 10:30 at night? A. Yes.

*Michael Castellano, Plaintiff, Cross*

Q. And you were all over that hatch; is that correct?  
A. Yes.

Q. You were in number one hatch and you were on number two hatch? A. Yes.

Q. The same conveyors were working? A. Yes.

Q. During that entire time from 7 o'clock in the morning until 10 o'clock at night, did you see any boxes falling?  
A. Occasionally.

Q. When on that date? A. Around afternoon.

Q. Afternoon. Did you ever tell anybody that you never saw any boxes fall? A. Not that I remember.

Q. You never told anybody that? A. I don't know.

Mr. Sergi: The examination before trial of (72)  
July 1973, Page 28.

Q. Do you remember this question:

"As far as you know, no boxes fell off except the one that fell and hit you on the head?"

Do you remember that question? A. Yes.

Q. Do you remember that question? A. Yes.

Q. And the answer was:

"Not that I know of."

Now, do you remember that answer? A. Mr. Sergi?

Q. No, don't give me that. Do you remember the question and do you remember the answer? A. I want to tell you one thing.

Q. Don't tell me anything.

The Court: Mr. Castellano, answer the question. Don't make a speech to him, the question is very simple, tell him do you remember giving that answer to that question on July of '73?

The Witness: Yes.

Q. (By Mr. Sergi) Was it a lie then and a lie now?

*Michael Castellano, Plaintiff, Cross*

A. That's the way I remember. I'm not the same man I was before. Since the accident, a lot of things I forgot, (73) one thing to another.

Mr. Hart: The plaintiff is not responsive.

Q. (By Mr. Sergi) You don't remember now?

The Court: It's the way he—

The Witness: Sometimes see box fall. What I remember.

Q. (By Mr. Sergi) I didn't ask you that, sir. We are only asking whether you remember this question and this answer; do you remember it? A. What?

Q. Do you remember that question and that answer?  
A. Yes.

Q. Did you say that under oath when you swore to tell the truth? A. Yes.

Q. And you swore to tell the truth here; is that correct? A. Yes.

Q. Are you telling the truth now or were you telling the truth then; or were you lying then or are you lying now? A. I never say I lied. The way I remember then, this is the way I remember now.

Q. You remember it different now? A. Maybe I remember different now.

Q. Okay. Mr. Randazzo (phonetic)—

(74) Mr. Bushlow: Mr. Randazzo?

Q. (By Mr. Sergi) I beg your pardon. Mr. Castellano. Do you say that your memory is better now than it was in 1973, three years after the accident instead of seven years after the accident?

Mr. Bushlow: Seven years after the accident, if we're still in '75, I know I'm getting older.

The Court: I don't think we're seven years after the accident.

*Michael Castellano, Plaintiff, Cross*

Mr. Bushlow: Five years.

Mr. Sergi: Five years, all right.

Q. (By Mr. Sergi) Was your memory better then than it is now or is your memory better now? A. What the time pass I—one thing then, don't remember then.

The Court: I don't get that answer, read it back. Wait a minute, let him read back the answer.

(Whereupon the requested answer was read back.)

Q. (By Mr. Sergi) Mr. Castellano, did you or did you not see any other b x fall during that entire day and night? A. Maybe I did, I don't know, I don't know.

Q. Did you or didn't you? A. I don't remember.

Q. Now, you don't remember? (75) A. Could be yes, could be no, I don't remember.

Q. Moments ago you said you saw a box fall. Were you mistaken? A. Everyday you see box falling.

Q. Everyday you see boxes fall. Did you see boxes fall that day? A. I don't remember.

Q. You don't remember. Did you make any complaints to anybody that boxes fell on you that day, all day and all night? A. It's not my job.

Q. Did you make—

Mr. Bushlow: If your Honor please,—

The Court: The answer is no.

Mr. Bushlow: Mr. Sergi is shouting again.

The Court: He's not shouting, he's trying—I have a very hard time hearing this witness and anything that Mr. Sergi can do to raise his voice in reply is going to be helpful. It really is.

Mr. Sergi: I'll try to soften my voice.

Q. (By Mr. Sergi) Mr. Castellano, were any complaints made that day about any boxes falling? A. Not that I know of.

*Michael Castellano, Plaintiff, Cross*

Q. Pardon? A. It's not my job to make any complaints.

(76) Q. I didn't ask what your job was. A. I don't know.

Q. Do you know whether any complaints were made that day of any boxes falling? A. I don't know. I don't know.

Q. Let me refer to the same examination on Page 27.

"Question, Mr. Castellano, you were working in the area of number one and number two hatch of the "Polarstein" of approximately 7 o'clock in the morning until 10:30 at night."

And the answer is:

"Yes."

Do you remember that question and that answer? A. Yes, sir.

Q. The next question:

"Were there any complaints with the conveyors on that day?"

"Answer, No."

Do you remember that question and that answer? A. Yes.

Q. That does refresh your recollection; is that right? A. Yes.

Q. The next page, 28:

"No complaints at all?"

(77) "Answer, No."

Do you remember that question and that answer? A. Yes.

Q. Were the conveyors all right, all day and all night, were they working; is that right? A. Yes.

Q. From 7 A.M. until 10:30 at night, were all the conveyors working all right? A. Yes.

*Michael Castellano, Plaintiff, Cross*

Q. As far as you know no boxes fell over? A. Not that I know of.

Q. Now you testified yesterday with Mr. Bushlow that there were no nets under the conveyor. Do you remember saying that yesterday? A. Yes.

Q. How many years have you worked there, ten years? A. Twenty years.

Q. Twenty years. And you worked around conveyors 20 years, right?

Did you ever, ever, up to the time of your accident see any nets put under conveyors? A. No.

Q. Never; is that right? A. Yes.

Mr. Sergi: I move to strike that unless it's (78) hooked up with another witness, your Honor, it has nothing to do with this accident.

The Court: I'll reserve on that same as the other motions. Make those motions at the end of the case, not during the course of the trial. At the end of the plaintiff's case.

Q. (By Mr. Sergi) Now, you were working with longshoremen around conveyors and the discharge of boxes for 20 years; is that right? A. Yes.

Q. Did your foreman or any of your bosses ever tell you don't stand in the square of the hatch in case something falls down; did they ever tell you that? A. Not that I remember.

Q. Not that you remember? A. No.

Q. Isn't it a practice, isn't it usual, isn't it customary not to stand in the square of the hatch in case something falls down? A. Right.

Q. Right. Now, why is that right? A. You got to watch, you could get killed.

Q. In case something falls down you get killed, right? A. Right.

(79) Q. So you take yourself away from the square of the hatch; is that right? A. Yes.

*Michael Castellano, Plaintiff, Cross*

Q. When you were hurt in this accident, you were in the square of the hatch; is that right? A. Yes.

Q. It was dangerous; right? A. Right.

Q. And you knew it? A. Yes.

Q. But you stood there anyway? A. No, I no stood there.

Q. Well you worked there, right? A. Was machine set there, I had to work there.

Q. Sir, you could tell the men in the hatch where you working to stop the conveyors until you pulled the plug so that in case anything fell you wouldn't be hurt; could you have done that? A. Never did.

Q. You could have done it? A. It's not my job to stop—

Mr. Bushlow: Why don't you wait for his answer.

Q. (By Mr. Sergi) I got the answer, it's on the record. (80) Isn't it a fact you are the one who pulls all the plugs? A. Yes.

Q. You could say to the man right up on the D deck, put your foot on the brake and stop that conveyor until I pull the plug out; could you have done that, right? A. I could have.

Q. But you don't do that, right? A. I don't do that.

Q. In all of your 20 years, did you ever pick up the boxes yourself? A. No.

Q. You never carried those boxes? A. No.

Q. And you never carried the boxes on the day you were hurt? A. No.

Q. Did you ever weigh the boxes in your hand? Did you ever pick up the boxes and hold them in your hand; never, right? A. No. Sometimes I took a box of bananas home, I—

Q. On the day that you were hurt, did you pick up any of the boxes? A. No, not that I remember.

*Michael Castellano, Plaintiff, Cross*

(81) Q. How do you know it was 45 pounds, somebody tell you? A. It's marked on the boxes.

Q. You saw the markings on the boxes? A. Sometimes they got it.

Q. Did you see the markings on the boxes, that they were 45 pounds? A. Not that day.

Q. Not that day. How do you know whether they were Cabana boxes or Sula? How did you know that? A. Just size boxes.

Q. Could you see the type boxes? A. Oh, yeah.

Q. Did you know the difference in the boxes? A. They are high boxes.

Q. What does the word Sula mean to you? A. To me doesn't mean nothing. Just the boss, all them call it Sula, maybe different port.

Q. Different port? A. Probably.

Q. It means it came from the Port of Sula, right? A. But it was a different box altogether.

Q. Doesn't mean bigger or smaller? A. They were big boxes.

Q. They were? (82) A. They are big boxes, yes.

Q. Just on that day? A. No, we had a box like that previous.

Q. For how many years? A. Maybe six, seven months, the most, a year.

Q. Almost a year? A. I don't remember.

Q. During the one year or six months that they were using those boxes, did you ever see them fall off? A. Yes.

Q. How did they fall off, were they pushed off, or were they dropped off? A. One just came up through a conveyor, these boxes go high, used to tumble.

Q. See the box in the photograph? A. Yeah.

Q. Are they higher than the side rails on the conveyor? A. Yes.

Q. Do you see where they are in the middle of the conveyor? A. Yes.

*Michael Castellano, Plaintiff, Cross*

Q. Who puts them in the conveyor in the middle? A. Longshoremen.

Q. Your co-workers, right? (83) A. Yes.

Q. If they put them on the side they can fall off; is that right? A. They got to put them on the conveyor.

Q. Put them in the middle, just like these? A. Yeah.

Q. And these, these boxes here, are about how high are these boxes, could you tell? They're pineapple boxes, right?

Say they are about maybe 10 inches? A. Those higher, way high.

Q. Are these nine, ten inches? A. More than that.

Q. Are they more than four inches? A. I don't got no information.

Q. How high is the sides, four inches you say? A. About three and a half, four inches.

Q. Those boxes are way higher? A. Way higher.

Q. Way higher. They're riding up and down; is that how they ride up and down? A. Yes.

Q. I show you Defendant's double A 2, is that the way the side of the conveyor looked when they are up? A. Yes.

(84) Q. Who puts the side of the conveyors up? A. Longshoremen.

Q. Longshoremen. If they don't put the side of the conveyor up, then a box would fall off? A. The machine doesn't run.

Q. The machine doesn't run. A. Couldn't put no box on the side, top of you, don't lift side rails.

Q. Is that the way it looks when the rails are down? A. Yes.

Q. But the machine will run, can't put the boxes on? A. Right.

Q. I show you double A 3, is that the way the box runs along the conveyors as it goes up? A. Yes.

Q. Now, the rollers are flat like this; is that right? A. Right.

*Michael Castellano, Plaintiff, Cross*

Mr. Sergi: I withdraw the last question.

Q. I ask you to look at Defendant's double A 4 please and—

Mr. Bushlow: Which one is 4?

Mr. Sergi: Double A 4, Defendant's double A 4.

(85) Mr. Bushlow: Which one is it?

Mr. Sergi: The one—

Mr. Bushlow: Longshoremen?

Mr. Sergi: That's right.

Q. (By Mr. Sergi) The boxes that were being unloaded the day of your accident, were they larger than, smaller than, or the same size as, the boxes in that photograph?

Mr. Bushlow: Now just a moment; are you talking about at the time of his accident or all during the day, because there is testimony there were two types of boxes.

The Court: The Cabanas and Sulas. His question is were they larger than, smaller than or same size as either of the boxes?

Mr. Bushlow: Either.

The Court: Yes.

The Witness: I don't know, I can't recall if the same size or not.

The Court: You can't recall if they were the same size or not?

The Witness: The only thing I recall, only one type of box like, look, see, the other boxes are high.

The Court: I don't hear what you are saying. Either I'm standing right along side of him—

The Witness: I can't describe it if it's the same size boxes.

(86) The Court: I can't describe if they are the same size boxes?

The Witness: To me those look smaller than the box we had that time.

*Michael Castellano, Plaintiff, Cross*

Q. (By Mr. Sergi) Smaller than the box? A. Yes.

Q. Is that smaller? A. Looks like—

Q. This is small, lower? A. Yes.

Q. When did you last work at Pier 42 while they were discharging bananas? A. Monday.

Q. Monday. Were they discharging bananas? A. Yes.

Q. Were the boxes of bananas that were being discharged Monday the same size as the bananas, boxes that were being discharged back when your accident happened? A. No.

Q. Were they larger or smaller? A. They look like different package, different size but—

Q. Do you see what's in the boxes that are being discharged from this photograph? A. This is a pineapple.

(87) Q. Take a good look, read it. You see where it says bananas? A. I look at the name of the company, bananas.

Q. Can you see bananas on there? A. Yes.

Q. Can you see bananas in the box? A. I can't see.

Q. Can't see it? A. Cellophane on top.

Mr. Sergi: May I show this to the jury, your Honor?

The Court: Yes, you may.

Q. (By Mr. Sergi) From D deck, they had a conveyor just like is in double A 4; is that right, from D deck, they had a conveyor, it looked something like that? A. Yes.

Q. At the top on C deck, then they had to have a roller to roll it to the next conveyor? A. Yes.

Q. Then the roller was flat like this and the box was on the roller and you push it by hand, right? A. Yes.

Q. That's not worked by electricity, the roller? A. No, the rollers—

Q. Got to push it by hand? (88) A. Yes.

Q. You push it on the roller to the next conveyor that runs from C, D, up to D deck, right? B, C—I'm sorry, from C deck up to B deck? A. Yes.

*Michael Castellano, Plaintiff, Cross*

Q. And this roller is located right near the conveyor that comes up from D to C? A. Yes.

Q. And it comes over a little rise? A. Right.

Q. And it falls onto the roller, right? A. Yes.

Q. And the man's got to be there as the box comes out, got to catch it and make sure it doesn't fall off; is that right? A. Yes.

Q. And if he doesn't grab it, to put on the roller, then it can fall off? A. Just automatically you don't grab the boxes.

Q. Is the man at the roller at the top of the conveyor there to make sure that the box doesn't fall off; isn't that his job? A. Yes.

Q. If he doesn't grab it it can fall off? A. Yes.

(89) Q. Is that right? A. Yes.

Q. At the time of your accident, you don't know if the man was there on C deck to catch the grate and put it on the roller or not, you don't know that? A. I don't know.

Q. You don't know if it fell from the hand; is that right? A. Right.

Q. You don't know if there is a man that didn't take it; is that right? A. Right.

Q. Now, the roller—withdraw that.

The conveyors, they have to be put at a certain angle; is that correct, from one deck down to the other? A. Yes.

Q. And it is something similar to what I have here, just comes right along there; is that right? A. Yes.

Q. And it is the longshoremen who decides the angle, how they are going to put it? They can put it out there or put it down here; is that correct?

The longshoreman places it on the conveyor? A. Yes.

Q. If the conveyor is put too sharply down like (90) this, then the box can also fall off; is that right? A. Yes.

*Michael Castellano, Plaintiff, Cross*

Q. And the longshoremen control where they put the conveyor? A. Yes.

Q. Either out that way or either up and down? A. Yes.

Q. Right. Nobody else does that except the longshoremen? A. Yes.

Q. People who work for Bay Ridge; is that right? A. Yes.

Q. Standard doesn't work on there; is that right? A. I don't think so.

Q. Right. And the ship's officers had nothing to do with that, right? A. I don't know.

Q. Just Bay Ridge people, right. Now, there are two types of electricians at that time; is that right?

You don't understand? A. I don't follow you.

Q. Okay. I will withdraw the question.

It was your job when the ship came in to go on the ship and hook up and disconnect the conveyors? A. Yes.

(91) Q. And when those ships were in then you worked on the dock? A. Yes.

Q. And you prepared the machines? A. Yes.

Q. And if you couldn't fix the machines what would you do? A. We had a boss.

Q. You would call your boss? A. Yes.

Q. What was your boss' name? A. At that time Peter Bellow (phonetic).

Q. Who's your boss now? A. It's the same.

Q. What's the name? A. Peter Bellow.

Q. How about Peter Shirello (phonetic)? A. Frank Shirello, he's superintendent.

Q. Is there a Victor Shirello there? A. Yes.

Q. Who is he? A. He's superintendent, too.

Q. Superintendent, too. But Bellow was your boss?

*Michael Castellano, Plaintiff, Cross*

He's your boss now? A. Yes.

\* \* \*

(112) A. Yes.

Mr. Sergi: I have no further questions.

*Cross Examination by Mr. Cichanowicz:*

Q. Mr. Castellano, as I understand it, you testified both yesterday and today that after you were struck by something you looked and you saw a banana box; is that correct? A. Yes.

Q. Now, do you remember being asked before trial on July 31, 1973— A. Yes?

Q. —and at that time, you were first sworn to tell the truth; is that right? A. Yes.

Q. And then you were asked questions and you gave answers? A. Yes.

Q. And then, after the questions and answers were typed up, you were then asked to sign that testimony or not? A. Yes.

Q. Now, do you remember Page 26, being asked these questions and giving these answers? The questions were asked by Mr. Korson. Do you know who Mr. Korson is? A. Yes.

(113) Q. He is associated with your attorney, Mr. Bushlow; is that correct? A. Yes.

Q. Were you asked the question and did you give this answer:

“Question, Mr. Castellano, did you at anytime after you were hit on the head by this bunch of bananas have any opportunity to observe the box that hit you?”

“Answer, I don't remember.”

Were you asked that question and did you give that answer? A. Yes.

*Michael Castellano, Plaintiff, Cross*

Q. That was a question that your associate to your attorney asked you; is that right? A. Yes.

Q. Were you asked this question and did you give this answer:

"Question, Did you see the box of bananas that hit you at anytime after it hit you?

"Answer, I don't remember."

A. Yes.

Q. You never saw that box, did you? A. When I got hit, when I start to go down, I saw box fell in front of me, I see box from my head.

Q. You say now that you did see the box; is that (114) correct? A. Say I see a box after I got shot on my head, I see something falling before I fall down, I see box in front of me, got to be the box hit me.

Q. Do you knew if it was a box or something else that hit you? A. It as a box.

Q. Box. That you remember; is that right? A. That's what I remember.

Q. Although back in 1973 you said you didn't remember; is that right? A. That time I didn't remember well.

Q. I beg your pardon? A. That day I didn't remember well what happened.

Q. Is your memory getting better now than it was in 1973? A. You repeat all the - questions, something you remember which you didn't - member that day.

Q. Before you went over and had this testimony, questioned on these things, did you discuss your case with your attorney? A. No follow.

Q. In order to give this testimony, did you and your attorney go to some other office? A. Yes.

(115) Q. And before you went to this other office, did you meet your attorney at his office? A. No.

Q. Where did you meet? A. 80 Broad Street.

Q. You met him over there? A. Yes.

*Michael Castellano, Plaintiff, Cross*

Q. Didn't discuss this case at all with him before yesterday? A. Just told me, what's happened, that's it.

Q. Pardon? A. Just told me what happened.

Q. Told you to tell us what happened? A. Yes.

Q. And that's what you did in 1973, right? A. Yes.

Q. At that time you said you didn't remember? A. Yes.

Q. Whether you saw the box or not? A. Definitely, I don't see, I don't see when I got hit, I was not watching up in the air; after I got hit I see something fall, I see a box of bananas fall.

Q. You mean you are saying you didn't see it before it hit you, but you saw it after? A. Yes.

(116) Q. But those weren't the questions that you were asked, right? A. I don't know, I don't understand.

Q. You didn't understand? A. No.

Q. What don't you understand? A. The last question, what you say.

Q. Would you like to have me read it to you? A. If you want to.

Q. "Did you see the box of bananas that hit you at any time after it hit you?

"Answer, I don't remember."

A. I presume it was the same box I see fall in front of me.

Q. The question is were you asked that question and did you give that answer? A. Yes, I did.

Q. You have been working as an electrician for some 20 years on the piers? A. Yes.

Q. Your job say on the day of your accident was to go onboard this ship? A. Yes.

Q. And make a connection between the conveyor and the power lines; is that right? (117) A. Yes.

Q. And then from the time you made the connection until the time came when you had to disconnect, what did you do, just sit around? A. No.

*Michael Castellano, Plaintiff, Cross*

Q. What did you do? A. They no put the conveyor at once.

Q. Pardon? A. They been there hour, half hour, depending on the time they need.

Q. I'm talking abou. now, about your job, your job was to connect the power lines to the conveyor and disconnect; is that right? A. Yes.

Q. And that was the only work you did on the ship, right? A. Yes.

Q. You didn't have any other duties? A. No.

Q. You didn't have to lift boxes of bananas? A. No.

Q. During the time between the time that you connected the conveyor to the power line and the time that you had to either disconnect it, what did you do; did you just sit around on the ship, did you walk off the ship, or what? (118) A. I might have gone for coffee, coming back. But I had no other duties on the ship other than just to connect and disconnect.

Q. Now on the pier, where you have been working, do you just disconnect or connect or do you do other types of work? A. Connect, disconnect portable machine we got on the pier. More or less the same job.

Q. More or less the same job? A. Only thing, this job ground level, right on the pier, no climb up and down.

Q. When you are working on the pier, you are working on the floor on another deck, aren't you? A. No, sir, no.

Q. What do you stand on? A. You get your wire, got to go down the decks.

Q. Beg your pardon? A. You connect all the wires on the A deck, then you go down the deck by deck, wherever they need the machine.

Q. When you go down to B deck, when you make the connection, you stand on the deck of B deck; is that correct? A. Yes.

Q. So it's a level surface? A. Yes.

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*Michael Castellano, Plaintiff, Re direct*

(126) *Re-direct Examination by Mr. Bushlow:*

Q. Mr. Castellano, it was your job to unhook the conveyors or to hook them up, whichever you were doing?

A. Yes.

Q. When they were needed; is that right? A. Yes.

Q. And where they were needed? A. Yes.

Q. Which you had to do? A. Yes.

Q. That's what you were told to do, that was the duties of your job? A. Yes.

Q. Whether it was under the wing or whether in the square of the hatch? A. Yes.

Q. Now we are talking about the conveyor that you were unhooking at the time of the accident.

Was that the conveyor that went from the D deck to the C deck? A. No.

Q. This was a conveyor that was resting on D deck?

Mr. Sergi: Your Honor, I think perhaps the witness ought to testify at this point. We are along in this (127) trial.

The Court: Yes. Don't lead the witness.

Q. (By Mr. Bushlow) Where was this conveyor that you were going to disconnect? A. B deck.

Q. Did it have—did it reach from the D deck to the C deck? A. No.

Q. And what was this conveyor used for when it was being in use before you disconnect it? A. It was a line to bring the bananas to.

The Court: It was the line what?

The Witness: Once they got the line from the three different lines come in, coming from this direction, from this to that direction. So as soon as they finish this corner, move this machine to other side.

*Michael Castellano, Plaintiff, Re-direct*

So this machine now clean that corner, center square, soon as they finish that, call electrician, I go down, disconnect, move this machine to other spot.

Q. (By Mr. Bushlow) Now do I understand Mr. Castellano, that these three conveyors, not the one that went from the D deck to the C deck, were used in different parts of the hatch? A. Yes.

Q. And do I understand, sir, that when there were (128) no more bananas over here— A. Yes.

Q. —they didn't need that conveyor anymore, then what did you have to do? A. I have to disconnect the machine.

Q. What did the longshoremen do with that conveyor? A. Rolled whatever they need them.

Q. When they rolled it over, put it in place, where they need it, what did you do? A. I connect the machine.

Q. But in the meantime, is the conveyor running from the D deck to the C deck, operating? A. Yes.

Q. Are the bananas going up the conveyor to go off the vessel? A. Yes.

Q. Now, you came back—with withdraw that.

Dr. Tagliatigambe, was the company doctor that you went to after you went to—after you got out of the hospital?

Mr. Sergi: Objection to the form of the question. There is no such thing as a company doctor.

The Court: Sustained. Strike out the answer, strike out the question, disregard it.

Q. (By Mr. Bushlow) At the time of your accident, sir, do you remember you were told by someone from Bay Ridge—

(148) Q. A thousand? A. Yes, many of them, right.

Q. The same conveyors were used all day from 8 o'clock in the morning until 10:30, right? A. Yes.

*Michael Castellano, Plaintiff, Re-direct*

Q. And no boxes of bananas fell over? A. I don't know.

Q. You didn't see any fall over? A. I'm not there all the time to see.

Q. But during the time you were there, you didn't see any boxes of bananas fall over, did you? A. Maybe five minutes, I didn't—maybe a minute before I got there, I don't know.

Q. During the time you were there, did you see any boxes of bananas fall over? A. I don't remember.

The Court: Mr. Bushlow.

*Re-direct Examination by Mr. Bushlow:*

Q. Just one question.

This ladder you climbed down from the main deck to B deck, is that a staircase or is that a straight ladder up against the wall? A. Some staircase, some straight against the wall.

(149) Q. But the one that you climbed down on, the "Polarstein", that day, was that a straight ladder or staircase like you walk up in the hallway? A. Straight down.

Q. Straight ladder? A. Little rungs on the ladder.

Mr. Bushlow: No further questions.

Mr. Sergi: No further questions.

The Court: All right, you may step down, Mr. Castellano.

(Witness excused.)

*Edward Salvatore, for Plaintiff, Direct*

Thereupon the plaintiff, further to maintain the issues on its part to be maintained, called as a witness, EDWARD SALVATORE, who, having been first duly sworn, was examined and testified upon his oath as follows:

*Direct Examination by Mr. Bushlow:*

Q. Mr. Salvatore, what is your occupation? A. Longshoreman.

Q. How long have you been a longshoreman? A. 24 years.

Q. Working on any particular cargo, any particular length of time in those 24 years? (150) A. Bananas.

Q. Working on bananas, had you worked as a hold man handling bananas? A. At times.

Q. Did you work as a gear man setting up the machines, setting up the runners? A. At times.

Q. Did you ever work as a deck man? A. Yes, sir.

Q. Sending the gear down? A. Yes, sir.

Q. And your present occupation today with the gang is what? A. We handling, I pass the gear.

Q. You've been doing this for about 24 years? A. Working bananas.

Q. When there is no banana boat in, do you do any other kind of work? A. I handle cargo, general cargo.

Q. How do you get those jobs? A. Either with orders, I go to the hall, hire hall.

Q. Where the longshoremen are if there is any work, you work somewhere else. But if there is a banana boat in, where do you work? A. Bananas is first.

(151) Q. Now, in these 24 years, you have done almost, acted in almost every capacity that anyone in the gang would act; is that right?

Mr. Sergi: Object to the characterization.

The Court: Sustained.

*Edward Salvatore, for Plaintiff, Direct*

Q. (By Mr. Bushlow) You have been a hold man, been a deck man, been a gear man and you also were a righter?  
A. Yes.

Q. Do you consider yourself, sir, in your opinion, to be an expert in this field?

Mr. Sergi: Objection.

The Court: Sustained.

Mr. Bushlow: Note my exception.

Q. (By Mr. Bushlow) Do you know the plaintiff in this action? A. Michael Castellano, yeah.

Q. Michael Castellano? A. Yes.

Q. Where do you know him from? A. The pier.

Q. How long do you know him? A. About 19 years.

Q. Do you know what his occupation or job is down on the pier? A. Maintenance.

(152) Q. Did you know him in January 1970? January 15, 1970? A. Yes, sir.

Q. Did you work that day? A. Yes, sir.

Q. Do you remember the name of the vessel you were working on? A. "Polarstein".

Q. What time did you go to work that day, Mr. Salvatore? A. 7 in the morning.

Q. At 7 in the morning? A. Yes.

Q. Before the longshoremen? A. Yes.

Q. Before the rest of the crew? A. Yes.

Q. What did you do when you got there at 7 o'clock in the morning? A. Well, deck men ring the booms. When they set up to take the gear onboard from the gantry, put it on the offshore side of the ship, you take the gear out of the boxes and you open up the weather deck.

If they need gear downstairs, right away to set up for rigging, you send gear down right away; if you don't stand by (153) until the gang comes in.

Q. When you say that you take the gear box from the gantry and put it on the weather deck, offshore side, just

*Edward Salvatore, for Plaintiff, Direct*

what is the gear box? A. It's a box about four-foot wide, ten-foot long, about 45-foot high.

Q. What kind of gears are contained in that box? A. Escape gear rollers and stands.

Q. Any electrical gear in that box? A. None.

The Court: Rollers. Wait a second, Mr. Bushlow. Rollers and what?

The Witness: Escape gear, like rollers, conveyors.

Q. (By Mr. Bushlow) What is your job in reference to that gear? When are you called upon to act in reference to that gear? A. Any time anybody needs any of this gear, that's the other box contained, stands, there are two identical boxes; one's got a stand, one's got rollers.

Whenever they call for gear on the deck below. Me, I pass it to them.

Q. How do you do that? Do you use the ship winches to pass your gear? A. No.

(154) Q. How do you pass it down? A. With a rope.

Q. By hand; is that right? A. Right.

Q. Now, once it's down there, do you have anything to do in your present job in setting it up? A. None.

Q. Who sets it up? A. The riggers.

Q. How does the electrical gear get down there? A. Whoever the electrician is, bring it down.

Q. Who sets the electrical gears? A. Whoever the electrician is.

Q. Was that Mr.—to set up the electrical gear? A. Right.

Q. Now on January 15, 1970, what kind of cargo were you discharging that day? A. Bananas.

Q. And do you know, sir, whether there were different sizes of bananas on that vessel that day? A. Yes.

Q. It was different size boxes of bananas? A. Not on the box itself. We had used to call them bananas and Dole, these here boxes was referred to as Sula boxes.

*Edward Salvatore, for Plaintiff, Direct*

(155) Q. Was there a difference in the shape of those boxes? A. They were shorter in length and taller in height.

Q. Which were those? A. The Sula boxes.

Q. Do you have any idea of the dimensions of that box? A. I would say she was about 17, 18 inches in length, about 15 inches wide, about 12 inches tall, 12, 13 inches, like that.

Q. What were the dimensions of the other boxes, say, the banana boxes? A. About 21, 22 inches long, 8 to 9 inches high. About 15, 16 inches wide.

Q. Difference in height, sir, than mathematically between these two boxes, height was anywhere from 4 and a half to five inches? A. I would say, maybe.

The Court: Three to four?

The Witness: Three to four inches.

Q. (By Mr. Bushlow) Do you know what the weight of the banana boxes, what they weigh approximately? A. 45 to 47 pounds.

Q. What would the weight be with the Sula boxes? A. Same weight.

(156) Q. Now all during that day, did you have occasion to be on that vessel at various times during the day? A. Mostly.

Q. Now, did you know that Mr. Castellano had an accident that day? A. Yes.

Q. Where were you when the accident happened? A. On the lower hold on D deck.

The Court: D deck?

The Witness: D deck.

Q. (By Mr. Bushlow) How far from Mr. Castellano were you? A. About six inches to a foot away.

Q. What was Mr. Castellano doing when this accident occurred? A. I noticed with some electrical equipment in his hand, either foot pedal or wire he was dragging.

*Edward Salvatore, for Plaintiff, Direct*

Q. What happened? A. Box come from above and hit him.

Q. What did you do when this happened? A. He started to sway, I put my hand around his waist and dragged him underneath the—

Q. Before this box came down, did you hear anything? Hear any warning? A. Shout, you know, but you hear it all day long.

(157) Q. Do you know where this box came from? A. No, I don't.

Q. You didn't see this box fall off? A. No.

Q. You just saw this box hit Mr. Castellano? A. Right.

Q. Now, are you familiar with the conveyors that go from the D deck to the C deck? A. Yes, sir.

Q. Have they any rails on them? A. Yes, sir.

Q. Will you describe the rails to us as to whether they are moveable or stationary. A. Collapsible.

Q. How high are these rails? A. About four inches.

Q. Is this the same type of conveyor that will go from the C deck to the D deck? A. Yes, sir.

Q. And how about from the B deck to the A deck? Is that the same type of conveyor? A. Yes, sir.

Q. From the B deck to the A deck? A. Yes, sir.

Q. Now, is there any difference in the rails on the (158) B deck to the A deck as compared to D to C; A, C, to B?

Mr. Sergi: Object to the form of the question. Are we speaking only of the day of the accident?

Mr. Bushlow: Yes, on the day of the accident.

Mr. Sergi: I withdraw my objection.

Q. (By Mr. Bushlow) On the day of the accident, was there any difference in the rails of the conveyor going from the A deck to the B deck as compared with the conveyor coming from the C deck to the B deck? A. That's rails on the A deck, to B deck, and they are stationary.

*Edward Salvatore, for Plaintiff, Direct*

Q. I show you Defense Exhibit AA in evidence and ask you to look at 1, 2, 3, 4 pictures. A. What was the question again.

Q. Read it back.

Look at the pictures, 1, 2, 3 and 4.

Are any of those conveyors shown in that picture, the conveyor that went from the A deck to the B deck? A. No.

Q. Now I ask you to look at Plaintiff's Exhibit No. 4 in evidence and ask you to identify that conveyor.

The Court: You are asking whether he can identify it?

Mr. Bushlow: Can you identify that conveyor?

The Witness: I can.

(159) Q. (By Mr. Bushlow) What conveyor is that? A. That's the A to B deck machine.

Q. Is there a number on that conveyor? A. 103.

The Court: What?

Q. (By Mr. Bushlow) Recognize that number? A. I see it everyday. You know, every working day, anyhow.

Q. Is that the same conveyor on that picture that was used on January 15, 1970? A. Yeah, that's it.

Q. Now, sir, could you tell us at approximately how long that particular conveyor had been used prior to this accident by the longshoremen in discharging bananas? A. I can only go to '69, we moved there and I went into the hatch. That man stays in that hatch unless something goes wrong, or something.

Q. Where did that machine come from, what other pier? A. I assume it came from Pier 13 because I came with them.

Q. Did you work on Pier 13? A. Yes.

Q. Did you work with that particular conveyor on Pier 13? (160) A. I wouldn't now.

*Edward Salvatore, for Plaintiff, Direct*

Q. When that particular conveyor in 1969 came over to Pier 46, was it a brand-new conveyor or was it— A. 42? You mean 42?

Q. 42.

The Court: Are you objecting? I don't want to object to it, but I don't see what relevancy it has. Make your objection standing up.

Mr. Cichanowicz: Object to this line of questioning.

The Court: Yes, I'll sustain it. I don't see any relevancy.

Q. (By Mr. Bushlow) How long, sir, if you know, had those Sula boxes, these higher and shorter boxes been used prior to this accident for packaging bananas?

Mr. Sergi: Object to the relevancy.

The Court: No, I'll allow that.

A. I would say maybe a year before we got over to 452.

The Court: A year before you got over?

The Witness: Right.

The Court: The year at—

The Witness: 13.

The Court: Been using Sula boxes?

The Witness: Could have been a year, year and a (161) half, like that.

Q. (By Mr. Bushlow) And when did you get over to Pier 42 in '69, about what month, if you remember? A. First or second of December.

Q. So when this accident happened on January 15 of 1970, you had been there a little over a month; is that right? A. That's right.

Q. Now in the Sula bananas, or Sula boxes, began to be used by the company, had any change been made in the

*Edward Salvatore, for Plaintiff, Direct*

conveyors that were being used? Had the rails been lengthened and the conveyors been widened; had any new conveyors been ordered? A. Not that I know of.

Q. I ask you to look at Plaintiff's Exhibit No. 4, the small picture, and ask you if you can identify that box as to whether that represents the Sula box or represents the other boxes that were mentioned? A. That is not a Sula box.

Q. Are you still working down at the pier? A. Yes.

Q. When was the last time you worked there? A. Monday.

Q. Are there any Sula boxes being used now?

Mr. Sergi: Objection, irrelevant, immaterial.

The Court: Sustained.

Q. (By Mr. Bushlow) Those boxes that you see on (162) that picture, is that the type of boxes that are now being used? A. Yes.

Q. For bananas? A. Yes. That's the type.

The Court: That is not the Sula box, is it?

A. No, sir.

Q. (By Mr. Bushlow) When the A deck is completely discharged, how many longshoremen remain on the A deck while the rest go to the B deck? A. Three.

Q. Now when the B deck is completely discharged, how many longshoremen remain on the B deck? A. I'm including myself.

Q. You include yourself? A. Right.

Q. So that means, but do you actually load or discharge the cargo? A. No.

Q. How many actually remain on the A deck, actually discharging the banana cargo—after the A deck has been cleaned off? A. Two men remain and myself.

Q. How about the B deck, how many men remain on the B deck after the B deck has been cleared of cargo? (163) A. Two more.

*Edward Salvatore, for Plaintiff, Direct*

Q. Now can you tell us what the duties of those two men are? A. On the A deck is a fellow at the head of the machine controls, the button from B to A at the port door, there is another man watching they don't get hung up, going out the door, or traveling around when it leaves the head of the machine.

Q. What about the B deck? A. B deck, you have a man at the bottom of the A to B machine. That's on the in-shore side, off-shore side you have a man running the machine from B to C.

Q. And does this man do—who's at the bottom of the conveyor from the A to B, what is his job?

Keep the boxes in line, make sure they don't get hung up on the way up?

Now, can you tell us, sir, what do you mean by patting the boxes? A. Well, it will keep them steady on the belt. If you touch them like this when they start to climb up, if you touch them like that it will keep the boxes steady.

Q. Now during the day, sir, January 15, 1970, while you were aboard the vessel, did you have occasion to see any boxes of bananas fall? A. At times.

(164) Q. Do you remember how many? A. I don't keep track.

Q. Could you tell us sir?

The Court: Wait a minute.

The Witness: I don't keep track of any boxes that fall.

Q. (By Mr. Bushlow) Can you tell us were they Sula boxes that were falling on A, B, C or D deck or—on that day, on that level? A. I think they were in the lower hold.

Q. That would be on the D deck? A. D deck.

Q. Now do you keep a record, sir, of the time that you work everyday? A. Yes.

Q. Have you done that as a general practice all through the years? A. For the past 10 years.

*Edward Salvatore, for Plaintiff, Direct*

Q. Past 10 years. Record of everyday that you work?  
A. Yes.

Q. If you have that record? A. I don't have it, I only have with me two years because I wanted to refresh my memory, see what time I had got done that night, that's why I brought it down.

(165) Q. Will you take them out, sir.

Mr. Sergi: I don't understand the relevancy of this particular time that was kept by this witness as to the issues in this particular case.

The Court: I don't either.

Mr. Bushlow: I want—maybe you can remember until what time you worked that night.

The Witness: 1 in the morning.

Q. (By Mr. Bushlow) Now, you worked from 8 to 12 in the daytime, or 7 to 12. What do you do between 12 and 1? A. Lunch.

Q. Now, do you get any break or any supper hour when you work late? A. None.

Q. Work straight through until one, 1 o'clock, you work on to 1 o'clock? A. Until you finish.

Q. Do you know how many men were on the B deck—withdraw that.

About what time did this accident happen to Mr. Castellano? A. About 10:30.

Q. At that time, sir, do you know how many men were working on the B deck? A. On B deck?

(166) Q. Yes. A. Two men are supposed to be there.

Q. Two men. Do you know actually how many were there? A. No, sir.

Q. After this box hit Mr. Castellano, you say you grabbed him and brought him under the wing? A. Right.

Q. Can you tell us whether he was unconscious? A. He was dazed.

*Edward Salvatore, for Plaintiff, Cross*

Q. Was he bleeding? A. No.

Q. How long did he stay under the wings? A. Say about 15, 20 minutes.

Q. Then what happened? A. I think I helped assist him to get to the escape hatch ladder, me and a few other fellows.

Q. Did you finally get off the vessel? A. Yes, he did, I didn't leave the lower hold.

Q. You don't know what happened to him after that?  
A. No.

Q. And do you remember when you saw him again after that? A. When he came back to work.

Q. About how long after this accident, do you (167) remember? A. About a year later.

Q. You know Mr. Castellano from the pier; is that right?  
A. Yes, sir.

Q. You socialize with him? A. No.

Q. Do you know his wife? A. No.

Q. Do you know his family? A. No.

Q. Does he know your wife? A. No.

Q. Your family? A. No.

Q. Ever visit his home? A. No.

Q. He ever visit your home? A. No.

Q. Just know him as co-worker down at the pier; is that right? A. Right.

*Cross Examination by Mr. Sergi:*

Q. Mr. Edward Salvatore, what is your job down (168) there? A. Passing the gear.

The Court: I'm sorry, what was that?

The Witness: Passing the gear.

Q. (By Mr. Sergi) Were you considered a gear man?  
A. You referring to cargo?

*Edward Salvatore, for Plaintiff, Cross*

Q. No, no. On banana ships, were you a gear man?  
A. Right.

Q. And you would bring the boxes of the rollers that you discussed before, you would bring it to the docks next to the ship and they would pick them up and put them on the deck. A. No, sir.

Q. No. Would you bring them on the ship yourself? A. No, sir.

Q. How would they get on the ship? A. Deck men.

Q. Deck men. Now, would you have it brought to the docks next to the ship? A. It's already there.

Q. Where would that box of gear come from? A. The gantry.

Q. What is the gantry? A. It's a float.

Q. Like a barge open float? (169) A. Right.

Q. How would the gear get onto the gantry? A. When we discharge it on the banana ship before that one that was on now. When we discharge it from the lower hold if I'm on the deck, I would land it on the gantry or if I'm in the lower hold, I'd fill the boxes.

Q. So when you were finished with the gear, you removed it from the ship and you put it on the gantry? A. That's where it's put, on the gantry.

Q. Does it stay there? A. Yes, sir.

Q. Do the conveyors stay there, too? A. Yes, sir. You are talking about them long machines. They all remain there, the long machines and the boosters.

Q. The long ones and the small ones and the rollers, they all stay on this gantry. It's like a floating warehouse, is it covered? A. No, sir.

Q. Just open? A. Yes.

Q. A float, a large float? A. That's right.

Q. And the large machines and the small machines and the rollers are all kept there? (170) A. That's right.

Q. When the gear is necessary for the banana ship, you would go over and get the gear box? No one would

*Edward Salvatore, for Plaintiff, Cross*

bring the gear over? A. Nobody, the gear is laying down here on the gantry. They put a gangway man on that ship. You have two dock men out there which will hook it up, whatever they need in the hold in respect to those machines or the gear boxes will go into the hold if you have room.

Q. So the longshoremen operate a crane on the ship and they send down the hook or whatever the crane tables, right, and they send it down on the gantry, they hook up the gear they need and they bring it on the ship? A. That's right.

Q. Who decides whether to pick out or take off the gantry? A. Everything comes out.

Q. Who decides which piece to take off first? A. I don't follow you.

Q. Well there are rollers, are there? A. Everything comes out.

Q. Everything comes out at one time? A. Yes, sir.

Q. And where is it put? A. First on weather deck, it's put on weather deck, (171) on A deck, it's on A deck.

Q. Is it all removed at one time from the gantry? A. One time.

Q. The boxes, the two gear boxes come on board wherever you want to put it, A, B deck, weather deck, that's where they put it.

I understand.

What I'm trying to find out Mr. Salvatore, does anyone go onto the gantry, the floating barge and pick out the different pieces of equipment or do you just take it up one at a time and put it up on the deck or put it down in the hatch where it's needed? A. Mr. Sergi, they both come up and get both boxes, all the gear. If you're only working one deck or four decks or six decks, that gear comes up on board the ship because you can't later on turn around and send for more gear down there.

*Edward Salvatore, for Plaintiff, Cross*

Q. But nevertheless it's Bay Ridge longshoremen that take it from the gantry and put it in the ship? A. Sure.

Q. And it's Bay Ridge longshoremen who decide which conveyor to put in a particular hatch, right? A. Mr. Sergi, that gear, them equipment that machines would belong to Number two come up there, all bananas. If you need one of them, three of them, whatever you need, they (172) all come up, you don't interrupt the operation.

Q. I'm trying to find out, Mr. Salvatore, you had how many large conveyors did you have in Number one hatch? A. Number one, they carrying three large conveyors.

Q. Three large conveyors. They were brought from the gantry and put into the hatch where it was needed; is that right? A. That's number one.

Q. One at a time; is that right? A. If they need him on deck, if there is no room in the hold, they will go on deck and remain there until there is room.

Q. I am trying to find out, Mr. Salvatore, when you need the first conveyor to put in Number one hatch between A deck and B deck, who selects that particular conveyor to put between A deck and B deck; who makes that election?

Who decides which one? A. I would assume the hatch boss.

Q. The hatch boss works for Bay Ridge? A. Sure, that's who he works for.

Q. He would pick out any conveyor he wants to put between A and B; is that right? A. Sure.

Q. He could pick out any conveyor he wants to put between B and C? And, the same for C and D? (173) A. Sure, he could do whatever he wants to.

Q. You have there defense exhibit A—

Mr. Bushlow: No, Plaintiff's.

Q. (By Mr. Sergi) Defense double A in evidence, one, two, three and four. I ask you to look at number two.

*Edward Salvatore, for Plaintiff, Cross*

Do you recognize that as a conveyor that was used by Bay Ridge? A. Yeah.

Q. And do you recognize the conveyor in picture number three as a conveyor used by Bay Ridge? A. Yeah.

Q. And the one in number four, a conveyor used by Bay Ridge? A. I can't see the sides of it, but most likely that's the kind they use.

Q. That's the kind they use; is that right? A. Yes.

Q. But you say that in Plaintiff's Exhibit No. 4, that's different than the ones in the defense exhibit double A? A. Oh, yeah.

Q. That's different? A. Sure.

Q. Who decided to put the conveyor that is in Plaintiff's Exhibit No. 4 between A and B in that particular (174) hatch; was it the hatch boss? A. In that hatch or on that day?

Q. In that hatch. A. She goes there all the time.

Q. Who puts it there? A. Excuse me, now. You mean from A to B?

Q. Yes. A. Or put it in this hatch?

Q. In that hatch between A and B. A. This machine comes up there all the time.

Q. It's the hatch boss' decision to put it there, right? A. Let me explain something to you.

Q. Don't explain. If you can't answer my question, don't answer, please.

Is this conveyor, Plaintiff's Exhibit 4 different than the conveyor in Defense Exhibit double A? A. Yes, sir.

Q. What is the difference? A. I notice it distinctly because of this here rail.

Q. What is the difference Mr. Salvatore? A. This here machine is either a foot or two longer than the other machines.

The Court: You are talking about when you say (175) this, you are talking about Exhibit 4?

The Witness: I am talking about B.

*Edward Salvatore, for Plaintiff, Cross*

The Court: The small photograph?

The Witness: Right.

The Court: All right.

The Witness: She's a foot or two longer.

Q. (By Mr. Sergi) Longer? Is that why it's used between A and B? A. Yes, they use it there, that I don't know, but that machine is always, I would say, 90 out of 100 ships used from A to B deck, that machine.

Q. Is that hatch number one or number two? A. Number two.

Q. And does hatch number one have the same type of conveyor between A and B? A. I wouldn't know.

Q. You work only one hatch or were you told specifically to look at this particular conveyor and no other conveyor? A. No, sir, no, sir. I work number one hatch, I work number four hatch, maybe work number one hatch twice in a year. I used to be, if you want me to explain to you—or you don't want?

Q. I want to know did you ever work hatch number two? (176) A. The whole five years that I'm there.

Q. Did you ever work hatch number one? A. As a gear man or as a deck man?

Q. Working bananas, did you ever work— A. As a gear man I worked about three days in number one; in five years as a deck man, maybe five times.

Q. Do they have the same type of conveyor as in the small photograph, Plaintiff's Exhibit 4? A. I wouldn't know.

Q. You would not know? A. No.

Q. Now you see in Plaintiff's Exhibit 4, there is a box in the photograph? A. Yes, sir.

Q. Were those boxes or that size box being discharged at this time of this occurrence, this accident? A. No, sir.

Q. Is that one of the size boxes being discharged? A. At the time of the accident?

*Edward Salvatore, for Plaintiff, Cross*

Q. Yes. A. No, sir.

Q. That was neither one? A. At the time of the accident, no, sir.

Q. Neither one? A. No, sir.

(177) Q. Do you know when that photograph was taken? A. No.

Q. The small photograph? A. No, sir.

Q. Do you see the box in the small photograph, what brand of bananas is in there in the box in the photograph, Plaintiff's Exhibit 4? A. Box has got it written on it, Dole.

Q. What brand bananas is being discharged in the large photographs, Defendant's Exhibit double A? A. It's got written on it, Dole.

Q. Same size box? A. I believe it is.

Q. And in all the photographs there, you see in 4 and the manner in which a Dole banana carton is being discharged, is that the way it's done? A. Yes, sir.

Q. Anything wrong with that? A. I don't see anything wrong.

Q. Did you see anything wrong on the day of this accident about the way the cartons were being discharged? A. Worked in a similar manner.

Q. Now, I understand that you don't know how this accident happened; is that correct? A. That's right.

(178) Q. You don't know how that box fell? A. No, sir.

Q. You don't know if it was thrown down, dropped down, or kicked off a conveyor; you don't know; is that right? A. No, sir.

Q. Do you know that the box came down because one of the workers jerked the conveyor when he started it and the box rolled down the conveyor and then fell off; do you know that? A. Possibly.

Q. Do you know that to be a fact? A. No, sir.

*Edward Salvatore, for Plaintiff, Cross*

The Court: You don't know that to be a fact.

Q. (By Mr. Sergi) Now, have you ever operated a conveyor? A. Yes, sir.

Q. You operated that with a foot pedal? A. Yes, sir.

Q. Just like a brake? A. Foot pedal.

Q. And the more you push it down the faster it will go; as you take your foot off it will slow down? A. No, sir.

The Court: You push your foot down, it runs; pick it up—

(179) Q. (By Mr. Sergi) Push down it starts; take foot off, it stops? A. Yes.

Q. So it's the man that operates the foot control, whether the conveyor is going to move slowly or stop or be quick? A. No, sir.

Q. No. Now, if the operator of the conveyor stopped on the pedal and the conveyor jerked and caused the box to roll down and strike another box and then fall off, that would have nothing to do with the sides of the conveyor, would it, Mr. Salvatore?

Mr. Bushlow: If your Honor please, if Mr. Sergi is asking him an opinion, I will object; he has not been qualified as an expert.

The Court: I'll sustain it.

Mr. Bushlow: I will not object if Mr. Sergi will concede this man is an expert.

Mr. Sergi: I don't concede anything.

The Court: You objected, I will sustain it on the same ground as before. This man was not an expert on that question.

Mr. Bushlow: By that objection, your Honor, I do not wish to disturb my original exception.

The Court: You can withdraw it, he's on the

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*Willie Jackson, for Plaintiff, Direct*

(3) WILLIE JACKSON, was duly sworn according to law and testified as follows:

*Direct Examination by Mr. Bushlow:*

Q. Mr. Jackson, what is your occupation? A. Longshoreman.

Q. How long have you been a longshoreman, Mr. Jackson? A. About 24 years.

Q. Mr. Jackson, during those 24 years, have you worked on any specialty, longshore work or have you done just general cargo work. A. I did general cargo and bananas.

The Court: General cargo and bananas.

The Witness: Yes.

Q. How long have you been working on bananas? A. About 24 years.

Q. Do you know the plaintiff in this action, Mr. Castellano? A. Yes sir, I do.

Q. How long do you know him? A. About 17 years.

Q. How do you know him? A. As a friend.

Q. Well, how did you get to meet him? (4) A. I got to meet him on the pit.

Q. While you were working? A. Yes.

Q. What kind of a boat? What kind of cargo were you discharging when you met? A. Banana boat.

Q. On January 15, 1970 did you work that day? A. Yes, I was.

Q. What pier were you working at? A. Pier 42.

Q. What river? A. East River.

Q. Remember the name of the boat you were working on? A. No, I don't.

Q. Do you know what kind of cargo you were discharging? A. Bananas.

Q. And was Mr. Castellano working with you that day? A. Yes, he was.

*Willie Jackson, for Plaintiff, Direct*

Q. What is his occupation or what is his job on the pier? A. He's an electrician.

Q. Does he have anything to do with the actual (5) moving of the bananas? A. No, he doesn't.

Q. Does he have anything to do with the rigging up and placing into place of any of the machinery? A. No, he doesn't.

Q. What is his job if you know? A. His job is to hook up the machine, the electricity to the machine.

Q. What was your job on that day? A. My job is to work the machines after I finished the A deck, the first deck.

The Court: I don't understand. Your job was to work the machines?

The Witness: Yes. I control—

The Court: On A deck?

The Witness: On A deck.

Q. Now, Mr. Jackson, in order for us to understand what time did you come to work that morning? A. 8:00 o'clock.

Q. Did you go aboard the vessel? Did you go on board the ship? A. Yes, I did.

Q. Now, did you get on, how did you get on the ship? Through the port doors or from the top deck? (6) A. We can't go up through the porthole. We can go up through the porthole, the first three, four men, if we can't, we go up on deck.

Q. What was the first thing you did that morning when you got aboard the vessel? A. We moved the boxes so that the other men can come down. We make a hole for the other men.

The Court: Make a hole for the other men to come down?

The Witness: Yes.

*Willie Jackson, for Plaintiff, Direct*

Q. Now, what do you mean when you say you make a hole for the other men? Just what do you mean? A. Sometimes the bananas all the way up to the top. We can't put the machine in the door.

The Court: What's? Puts—

The Witness: Gantry.

The Court: All right. I'm with you.

A. We just can't put it in the door. Maybe four, five feet and then we take about four men out of the four men in the hatch, we work on each side of the belt and make it to a hole we can get five feet in.

Q. So, you can put some pieces of pipes in there; is that right? A. Yes.

(7) Q. From then on, you can use the equipment; is that right? A. Yes.

Q. And when you finally make a big enough hole so you can use the equipment, what do you do with the other bananas on A deck? A. We work until we can get the square—

The Court: Get the what?

The Witness: Get the square finished.

Q. Now, when the square is finished, while you're working on A deck, is that square of the hatch open or is it closed? A. Closed.

Q. Now, when you finish the bananas from the square of the hatch— A. We work five and in. After we finish five, then we do from the side of the ship, and then we need more fellows with the deck. We open up the square.

Q. All right. Now in order to open up the square, you say you get two fellows? A. Yes.

Q. And the deckmen, what do the deckmen do? A. The deckmen, they use the winches.

Q. They send a line down and use the power (8) winches? A. Yes.

*Willie Jackson, for Plaintiff, Direct*

Q. To pick up those doors, open them up; is that right?  
A. Yes.

Q. So, now you open up the whole deck on the A deck and you can look down and what do you see when you look down? A. Three hatches full of—

Q. Full of what? A. Bananas.

Q. How are those bananas crated? A. By boxes.

Q. Wooden or cardboard? A. Cardboard.

Q. Now, what would you do then? A. Bring in two more fellows. We would like make a hole so we can get the long machine down on B deck.

The Court: What machine?

The Witness: The long machine.

Q. When you say "long machine" you mean the conveyor? A. Yes.

Q. That would go from what deck to what deck? (9)  
A. It would go from A to B.

Q. When you finish making that hole, how does the machine come down? A. The deckmen send it down. We range it up, we build it up to the size we want it.

Q. And when the deckmen send it down, then the long-shoremen set it up in the way they want it; is that right?  
A. Yes.

Q. Now, when it's all set up, does Mr. Castellano have anything more to do then? A. He puts the electricity in.

Q. Then, he comes down and puts the electricity in?  
A. Yes.

Q. Now, after you've got this all set up in the A deck to the B deck, what did you do next? A. I come back on A deck and run the belt.

Q. Now, when you say "come back to A deck to run the belt" you mean that you were the man who stood by the top of this conveyor and controlled the conveyor running from the B deck to the A deck? A. Yes.

*Willie Jackson, for Plaintiff, Direct*

Q. How did you, what apparatus did you have to control this conveyor? (10) A. I have a pedal.

Q. Foot pedal? A. Yes.

Q. In order to start the conveyor, what do you have to do with the pedal? A. I mash it down with my feet.

Q. Push it down? A. Yes.

Q. Now, when you take your foot off, what happens? A. Stops.

Q. You've got to stand there with your foot down; is that right? A. Yes.

Q. As you're standing there, what are you facing now as you look down? Can you see the B deck? A. Yes, I can.

Q. And do you see the end of your machine on the B deck? A. Yes, I do.

Q. And can you, I thought your Honor--

The Court: No, go ahead.

Q. And can yo see the rollers that connect to the end of your machine? A. Yes, I can.

(11) Q. And do the banana boxes come off the roller onto your conveyor up to you? A. They do.

Q. Now, when the men are working down on the B deck, is the A deck all finished? A. Yes, sometimes, and sometimes no.

Q. But now, you've got the men working on the B deck. Are most of the longshoremen working on the B deck now? A. Yes, they are.

Q. Now, does there come a time when the entire square of the B deck has been cleared away? A. Yes.

Q. What do they do now with the covers on the B deck? A. They do the same they do on A deck.

Q. Some people go down and make another hole to put another conveyor down? A. Yes, they do.

*Willie Jackson, for Plaintiff, Direct*

Q. And there comes a time when the B deck is completely cleared of bananas; is that right? A. Yeah, they do.

Q. Where are the longshoremen, where do they go after the B deck is finished? (12) A. They go to C deck.

Q. Do any longshoremen stay on the B deck at all? A. Yeah, they do.

Q. How many? A. Two.

Q. Two men? A. Yes.

Q. How many men are on the A deck with you? A. One more. Two with me. One and—

Q. There's two altogether? Now, you told me what your job is to stand at the machine? A. Yes.

Q. What does the other man do? A. The other man stands at the door.

Q. Stand at the door? A. Yes.

Q. And is that, those are double doors where the bananas go out on the pier? A. Yes.

Q. What did he do there? What's his job? A. He's standing there straightening the boxes.

Q. To see the boxes go out and go around to the truck; is that right? A. Yes.

(13) Q. Now, let's go down the B deck. Can you see the B deck from where you are? A. No, I can't see the whole B deck.

Q. Can you see where the edge of the machine is? A. Yes.

Q. And can you see this man who's standing there, well, there are two men. What does one man do? A. One man is standing on the end.

The Court: One man is standing on what?

The Witness: One man is standing on the end of the belt. See that the boxes come up.

Q. Where's the other man? A. If there is on C—man, the other man is mashing the—

*Willie Jackson, for Plaintiff, Direct*

Q. Mashing the pedal like you are? Where are those bananas coming from? From the C deck now? A. Coming from C deck.

Q. C deck to B deck? A. B deck.

Q. He's doing what you're doing except on B deck and you're doing it on A deck? A. Yes.

Q. And ~~you~~ say one man stands down at the bottom of your conveyor? (14) A. Yes.

Q. What is his job? A. See that the boxes come up straight.

Q. Now, where are those boxes coming from before they get onto your conveyor belt? A. Coming over the roller.

Q. If those boxes are not properly put on the conveyor belt at the bottom—

Mr. Sergi: Objection to the form of the question.

The Court: Sustained.

(15) Q. What do you mean when you say that he's there to see that the boxes are properly put on the belt? A. Yes.

Q. What do you mean by that? A. Well, sometimes when the boxes come they turn.

Mr. Sergi: I can't understand.

The Court: Sometimes the boxes, they turn around. They turn. That's what we have so far.

A. They'll come up one side on my belt.

Q. What happened? A. They will fall off, some of them.

Q. Are you familiar with those conveyors that go from the D deck to the C deck and C to B and B to A? Did you work with them all those years? A. Yes, I have.

Q. Now, the conveyor that goes from, have you worked on A deck at some times? A. Yes.

Q. Have you worked on B deck? A. Yes.

*Willie Jackson, for Plaintiff, Direct*

Q. Have you worked on C deck? A. Yes.

Q. Worked on the D deck? A. Yes, I have.

(16) Q. This conveyor that goes from the D deck to the C deck, are there any rails on the side of it? A. Yes, there is.

Q. Are those rails welded in an upright position?

Mr. Sergi: Why don't he ask him. I object to the leading.

Q. How are these rails put on the conveyor? A. Pardon me?

Q. How, describe to this jury and the Court what those rails look like on the conveyor and how they are put to use. A. On the A deck—

The Court: He asked you from D to C.

The Witness: From D to C?

The Court: Yes.

A. Well, from D to C they are folding rails.

Q. They fold? A. Yes.

Q. How high are they, if you remember? A. I'd say from three and a half to four and a half inches high.

Q. I show you Defendant's Exhibit XAA and I believe this is picture No. 2, I hope. I show you picture No. 2.

The Court: That's AA-2.

(17) Q. AA-2 and ask you to look at it and tell me if you can see those rails which you have just described? A. Yes.

Q. Where are they?

Mr. Bushlow: Have we got a pencil here?

The Court Clerk: What color?

Mr. Bushlow: Red, I guess.

The Court: That's the size of the rails going from D deck to C deck?

*Willie Jackson, for Plaintiff, Direct*

The Witness: Yes.

Q. Will you just make a cross on there. Now, while you have that picture, the conveyor going from the C deck to the B deck, is that the same type of a conveyor as that? A. Yes.

Q. The same type of rails? A. Yes, they are.

Q. Now, the conveyor going from the B deck to the A deck where you were, is that the type of conveyor they use? A. No.

Q. It's a different type? A. Yes.

Q. Would you take a look at those four pictures and see if you can see in Defendant's Exhibit AA-1, 2, 3 or 4 whether there is a picture of the conveyor going from the (18) B deck to the A deck? A. I can't see the end of it going from B to A.

Q. The end of it, but is there a large picture of it? A. No.

Q. Now, Mr. Jackson, I show you Plaintiff's Exhibit 4 for Identification and ask you to tell me what this is. A. This is a belt going from B to A, the top of it.

Mr. Sergi: What?

The Court: It's a belt going from B to A, the top of it.

The Witness: Yes. This is the top.

The Court: You stand right alongside of that position?

The Witness: Yes.

Q. Now, one more question on that belt. Is that the exact conveyor that you used on January 15, 1970? A. Yes, it is.

Mr. Bushlow: I offer it in evidence, your Honor.

*Colloquy*

Mr. Sergi: Your Honor, may we have a sidebar conversation or if you prefer to excuse the jury at this time we can have a conference during their absence.

The Court: Let's have a sidebar conference.

(19) (The following sidebar is heard out of the hearing of the jury.)

The Court: What's the objection?

Mr. Sergi: There is no proof that the boxes came between—fell down A to—

The Court: He's—

Mr. Sergi: Let me finish my objection.

The Court: He's not offering it for that purpose.

Mr. Sergi: Then, I believe, it is being offered for other purposes?

The Court: To show the conveyor belt, that's all.

Mr. Sergi: Your Honor—

Mr. Hart: Look at that comparison there.

Mr. Sergi: I object to the introduction of this conveyor belt unless this is the conveyor belt from which the box fell.

Mr. Bushlow: I am going to prove that through him.

Mr. Sergi: Otherwise it's irrelevant and immaterial; just not in the case. As he says, that's where the box fell from.

The Court: All right. He says he's going to (20) show that.

Mr. Sergi: When?

Mr. Bushlow: Just a moment. Even if I don't show that he ~~says~~ that is the exact conveyor belt that was used on the day of this accident.

Mr. Hart: So, are the others.

The Court: What are you going to do, block out the boxes? You're going to have him tell that these are the size of the boxes?

*Colloquy*

Mr. Bushlow: That's not the box at all.

The Court: How come the boxes—

Mr. Bushlow: Outside of the boxes.

The Court: Block the boxes out?

Mr. Bushlow: Outside of the boxes.

The Court: Block the boxes out?

Mr. Bushlow: I don't care.

Mr. Hart: Tear it up.

The Court: He says he stands right here and this is where he stands. It's to operate the machine and this is his position, where he operates this belt from. To block out the boxes, I think that's admissible.

Mr. Bushlow: That's not the boxes that was—I am asking, is this the type of box that fell because he testified—

(21) Mr. Hart: How about instructing the jury to disregard that box.

The Court: We are not going to show it to the jury yet.

Mr. Cichanowicz: Is that a sulu or cabana?

Mr. Hart: Cabana.

Mr. Bushlow: Then we'll show it to the jury when your Honor is finished?

The Court: Let's see.

Mr. Sergi: If he says the boxes fell off a conveyor that looked exactly like that—

Mr. Bushlow: That's the conveyor.

The Court: He says this is the conveyor he was operating on that day.

Mr. Sergi: We don't know where the boxes came from.

The Court: He is going to ask him. Let it—for Identification, that point. Ask him additional questions.

(22) (The following took place in the presence of the jury.)

*Willie Jackson, for Plaintiff, Direct*

Q. Do you know whether Mr. Castellano had an accident on January 15, 1970? A. Yes, I do.

Q. Do you know what— withdrawn.

Mr. Sergi: I can't understand and I can't see through you.

Q. Do you know whether he was hit by any object? A. Yes, I do.

Q. What was he hit by? A. By a box.

Q. Box of what? A. Bananas.

Q. Do you know where the box of bananas came from? A. Came from between B and A deck, off of my machine.

Q. Did it come off this conveyor? A. It did.

Mr. Bushlow: I now offer it into evidence, your Honor.

Mr. Sergi: No objection.

The Court: To be received.

(23) The Clerk: One photograph.

Mr. Hart: If your Honor please, I don't think this man testified he saw a box fall.

The Court: He said, it came off this conveyor.

Mr. Hart: Did you see it?

The Witness: Yes, I did.

Mr. Cichanowicz: The question was never asked.

The Court: He just answered it.

The Clerk: Plaintiff's Exhibit 4 received in evidence.

Mr. Bushlow: Thank you.

Q. Now, Mr. Jackson, on the particular day, January 15, 1970, on the Polarstein, how many different types of boxes were there in which the bananas came? A. We have two different.

The Court: Wait a minute.

*Willie Jackson, for Plaintiff, Direct*

Mr. Cichanowicz: Objection to the form of the question.

The Court: Read back the question. Don't answer the question.

(The question was read back.)

The Court: No, I'll allow it.

(24) The Witness: Answer?

The Court: Yes.

The Witness: Two.

Q. Did those boxes have any names you longshoremen call them? A. Yeah, they do.

Q. Do you remember the names? A. No, I don't.

Q. Do you remember whether there was any difference in the sizes of those boxes? A. Yes, I do.

Q. Now, can you tell us in your own words what was the difference in the sizes of those boxes? A. One of them was shorter and taller, shorter and higher.

Q. I show you this box which is Plaintiff's Exhibit 4 in evidence.

The Court: Wait a second. Now—

Mr. Sergi: Your Honor, that was supposed to have been excluded.

The Court: Wait a minute. Nothing has been excluded, yet. One of the boxes was shorter and taller?

The Witness: Yes.

(25) The Court: One was what?

The Witness: Regular.

The Court: Regular. What does that mean?

The Witness: That means like the size you get in—

The Court: You know you're talking to a lot of people that don't know what you're doing now.

The Witness: Well, one of the boxes is much higher than the other one.

*Willie Jackson, for Plaintiff, Direct*

The Court: One box is higher than the other. That's the shorter and taller one.

The Witness: Yes.

The Court: Then, what is regular, more square?

The Witness: Yes.

The Court: More long?

The Witness: More square and more long.

Mr. Hart: Can we have that reduced to millimeters and inches, if he knows?

The Court: You can do that eventually, but now he's going to show him Exhibit 4.

Mr. Cichanowicz: More square, more long than what?

The Court: I know for present purposes, we got two distinctions. One is shorter and longer and (26) one is more square and more long.

Q. I show you Plaintiff's Exhibit 4 in evidence and I ask you to look at that box and I ask you to tell me which one of the boxes, if any, is that one? Is that one of the boxes or type of boxes that was being discharged on January 15, 1970? A. This is the type of box. This is the small one.

Mr. Bushlow: That's the small one.

The Court: That's the one; that's the regular one.

The Witness: The regular one.

Q. Now, from the—you say you started to work at eight o'clock in the morning? A. Yes.

Q. You worked until twelve? A. Yes.

Q. Have lunch? A. Yes, one hour.

Q. Come back at one o'clock? A. Yes.

Q. From eight to twelve, where do you work? A. On A Deck.

Q. Came back at one o'clock? (27) A. Pardon?

*Willie Jackson, for Plaintiff, Direct*

Q. Came back at one o'clock after lunch? A. Yes.

Q. Where did you go back to work? A. On A Deck.

Q. Is that running the conveyor belt? A. Yes.

Q. Until, do you know about what time this accident happened to Mr. Castellano? A. Around 10:30.

Q. So, from 1:30 until ten o'clock, did you do any other type of work on that vessel except as you have just told us at A Deck, running the conveyor? A. No.

Q. Did you see the boxes of bananas as they came out, came up from D to C, C to B? Did you see them as they came up? A. Yes.

Q. Can you tell me approximately what time, if you remember, you started getting—with drawn.

Did there come a time in the day or evening when a different type of box started to come up? A. Yes.

Q. About what time was that? (28) A. Around 6:30, seven o'clock.

Q. What type of box was coming up now? A. The taller boxes, the higher boxes.

Q. Where were they coming from, if you know? From which level? A. From the D Deck.

Q. Did you change any equipment to accommodate this higher box? A. Yes, we did.

Q. What did you do? A. We changed the belt from B to A.

The Court: I beg your pardon?

The Witness: From B—from A to B, we changed the belt. We didn't change the belt. We had to do some more rigging. We had to lower the belt because of the big boxes.

The Court: Had to lower the belt.

Q. Why did you have to lower the belt? A. Because on the other boxes we usually put seven racks on the floor. But on the higher boxes we had to put six.

Q. Now, so we understand this, you say you put racks on the floor? A. Yes.

*Willie Jackson, for Plaintiff, Direct*

(29) Q. Is this something you had to rest the belt on?  
A. Yes. Had to rest the belt on.

Q. Put the belt on that; is that right? A. Yes.

Q. So, when you put seven, seven is higher than six?  
A. Yeah.

Q. So, for the big boxes you had to put six and take one away? A. Yes.

Q. What was the reason for that? A. Because of the big boxes. Coming from the B Deck because the machine was—

The Court: I do follow you.

Mr. Bushlow: The machine was under the coming, coming on the A Deck?

The Witness: On the B Deck.

Q. On the B Deck? A. Yes.

Q. So, if the machine, if there was not enough space between the machine and the coming, what would happen to the boxes? A. The boxes would never come up.

Q. Never come up? (30) A. No.

Q. So, you changed the pitch of the conveyor? A. Yes.

Q. Mr. Jackson, to get back to that Plaintiff's Exhibit 4 in evidence. That small picture, would you tell me about the rails. Are there any rails on that conveyor going from the A Deck to the B Deck? Any side rails from B to A? Is there any difference between those rails going on A conveyor from the B to the A Deck than the conveyor going from C to B? A. Yes, there are.

Q. What is the difference? A. These are standing rails. You cannot fold these rails on this machine. They are much lower.

Q. Those rails, are they attached to the conveyor themselves? A. Yeah, they are.

Q. And how high are those rails going from the B Deck to the A Deck? A. From two and a half to three inches high.

*Willie Jackson, for Plaintiff, Direct*

Q. Now, when the larger boxes started to come up, as you say, around 6:30 to seven o'clock, outside of changing the pitch on that conveyor, was anything done to the rails? A. No.

(31) Q. Was anything added to the rails? A. No.

Q. Were the rails made any higher? A. No.

Q. And if you know, sir, how much higher would you say those big boxes were than the other boxes? A. I'd say from three to three and a half inches high.

Q. Now, during the day, sir, did you see any ship's officers or crewmen or mates come down into the hole of this ship? A. Yes, I did.

Q. About what time did you see any? Between eight o'clock in the morning and twelve o'clock when you went out for lunch? A. When we finish A Deck we come down to the ship.

Q. You came back at one o'clock and started working again. See him coming down around that time? A. Yes.

Q. Let me ask you something, sir. As you worked from eight o'clock in the morning until twelve o'clock, you get a lunch hour; is that right? A. Yes.

Q. Now, when you come back at one o'clock and you (32) work, do you get a dinner hour? A. No.

Q. You work straight through? A. Yes.

The Court: Mr. Bushlow, you're going to get the jury a little bit upset if I don't give them a lunch hour.

Mr. Bushlow: Not me, your Honor.

The Court: So, I will do that right now. We'll take a lunch hour until 2:15.

Don't discuss the case during the lunch hour and we'll see you at 2:15.

(A luncheon recess was taken at 12:55 p.m.)

*Willie Jackson, for Plaintiff, Direct*

(33) (Time noted: 2:20.)

(The following takes place in the presence of the jury.)

The Court: Good afternoon. I am sorry I was a little bit late. I don't like to be late but this month as you may have gathered, I'm in the so-called Miscellaneous part of this court. And the Miscellaneous judge is the unfortunate one who has all of the other cases for the judges who are away on other business and what have you and he handles a good portion of the Grand Jury proceedings and other matters. I didn't get out of here until well into the lunch hour and handling other cases. That's the reason why.

If you'll accept my apologies and we'll continue.

WILLIE JACKSON, resumed and testified further as follows:

*Direct Examination by Mr. Bushlow (Continued):*

(The last question and answer were read.)

Q. You get any time off to have supper hour? A. No.

Q. And in the years you have been working on those bananas boats, well, first on this January 15, 1970, did you know what time you got through with that boat?

(34) A. About a quarter of 11.

The Court: I beg your pardon?

The Witness: Quarter after 11.

Q. Have there been times when you worked later than that? A. Yes, sir.

Q. What's the latest you ever worked? A. 5 o'clock in the morning.

*Willie Jackson, for Plaintiff, Direct*

Q. From 8 o'clock in one morning to— A. 5 o'clock.

Q. 5 o'clock the next day? A. Yes.

Q. All you had time was for lunch between 12 and 1 on the day you started to work? A. Yes.

Q. You had picked up those boxes of bananas on January 15, 1970, picked them up? A. Yes, I have.

Q. Both the longer box and as you said, the higher box? About how much would you say they weigh? A. Somewhere from 40 to 45 pounds.

Q. Was it approximately the same weight, both boxes? A. I'd say, yes.

Q. Now, during this day, January 15, 1970, was there (35) any safety helmets? A. No.

Q. On January the 15th, 1970, or at any time before that day, had you ever been issued any helmets? A. No.

Q. On January 15, 1970, the date of this accident, were you wearing a safety helmet? A. No.

Q. Do you know whether any of the other men working in the No. 2 Hatch were wearing safety helmets? A. I can't remember.

Q. Was Mr. Castellano wearing a safety helmet? A. I can't remember.

Q. Now, during the day you testified at certain times of the day a mate or officer of the vessel would come down the hold? A. Yes.

Q. You saw him? A. Yes.

Q. Did he speak to you? A. No.

Q. Can you remember on that day the last time that you saw any mate or officer come down into the hold of that ship? (36) A. About 15 minutes before the accident I had seen one.

Q. About what time would that be about? A. About 10 after 10 or a quarter after 10.

Q. Where were you at that time? A. I was on the deck.

*Willie Jackson, for Plaintiff, Direct*

Q. Is that where you had been on A deck near the control of the conveyor from the A to the B deck? A. Yes.

Q. Where was the officer or mate? A. He came where I was, beside me.

The Court: Came to a point beside you?

The Witness: Yes.

Q. Do you know his name? A. No, I don't.

Q. Did you talk to him? A. No.

Q. Did he talk to you? A. Yes, he asked me what time we were to finish. I told him about another hour.

Q. While he was standing there did anything happen on the conveyor belt? A. Yes, it did.

Q. What happened? (37) A. The boxes got hung upstairs so I stopped the belt.

The Court: Wait a minute.

The Witness: A box got hung up on the other end of the belt.

The Court: Got "hung up" on your belt?

The Witness: Yes. So, I stopped the belt.

Q. Where was it hung up, in the middle of the belt, near you or down on B deck? A. Down on B deck.

Q. Did you see this? A. Yes, I seen it.

Q. Was the officer standing beside you? A. Yes.

Q. Was he looking in the same direction you were looking? A. Yes, he was.

Q. Did he say anything to you? A. He asked me was the man supposed to be there. By that time a man came and straightened the boxes out so I started the belt.

Q. The man that came there to straighten the boxes out, was this the man, the second man down that hole who was supposed to be there? (38) A. It was supposed to be two men.

Q. How many was there? A. One at the time.

*Willie Jackson, for Plaintiff, Direct*

Q. Where was this one man during this entire operation? A. He was in the back of the belt.

Q. He was at the belt on the B deck same way you were on the belt on the A deck? A. No. He wasn't. He was about six foot from the belt.

Q. About how far from him was the beginning of the belt that went up from the B deck to the A deck? A. Six feet.

Q. And there was no man there, standing there, right at the bottom of your belt, was there? A. No.

The Court: A man came and—

The Witness: This was the man that ~~as~~ standing six feet.

The Court: That was the man who was doing the foot pedal work?

The Witness: Yes.

Q. Now, when you stopped your belt, what happened to the belt from C to B deck? (39) A. He stopped it, too.

Q. He stopped his? A. Once he came straightened out the boxes, he had to stop the belt.

Q. What about the belt from B to C deck? A. It was stopped.

Q. And so the man then, you're saying to us, that the man who was supposed to work the belt stopped his belt after you stopped yours and where did he go? A. He came to straighten out the boxes.

Q. Straighten out the boxes which were on your conveyor going up to the A deck; is that right? A. Yes.

Q. When this was being done, where was this mate or officer of the vessel? A. He was standing beside me.

Q. After this was straighten out, for how long did he stay? A. About 45 seconds or half a minute.

Q. Then, what did you do? A. I started the belt back again.

Q. When you started up the belt, did the officer stay there? A. No.

*Willie Jackson, for Plaintiff, Direct*

(40) Q. Did there come a time after that when something else happened on your conveyor? A. Yes.

Q. Then what? A. The same thing happened. Backed up and stopped the belt so the man came over and straightened up the boxes again.

Q. Now, during this time, how many men were working on B deck? A. I seen one.

Q. Do you know where the other one was? A. No, I don't.

Q. The second time this happened, did you stop your belt? A. Yes, I did.

Q. Did the man from the C deck to the B deck stop his belt? A. Yes, he did.

Q. From the B deck to the C deck? A. Yes, all of them stopped.

Q. And he walked over and straightened this out? A. Straightened it out, yes.

Q. When he straightened it out, were there any boxes of bananas on your belt? (41) A. Yes, there was.

Q. After it was straightened out, what did you do? A. I started running it again.

Q. What happened when you started it up? A. When I started running again, my belt, when I started running, when the belt—the belt automatically jumped. When the boxes went tumbling, then I took my foot off the belt right away. Stopped the boxes from tumbling and it fell in the hole.

Mr. Sergi: May we have it read back by the reporter, please.

The Court: Read it back.

(The last answer was read by the reporter.)

Q. In other words, Mr. Jackson, you're saying when you started the belt the boxes of bananas on the belt started to tumble? A. Yes.

*Willie Jackson, for Plaintiff, Direct*

Q. And then you took your foot off to stop the belt but that didn't stop the boxes and they went over the side of the conveyor and went down in the hole? A. Yes.

Q. Where you are standing, can you look right down the hole? A. Yes, I can.

(42) Q. Did you follow the box down? A. Yes, I did. I hollered first.

Q. What happened to the box? A. Hollered watch out below and I hollered but it was too late. The box already hit the fellow.

Mr. Sergi: Excuse me, box what?

Mr. Bushlow: Had gone down.

Q. Did the box—

The Court: Read it back.

(The last answer is read.)

Q. Where was this fellow that the box hit? A. He was in the square hatch on D deck.

Q. At that time did you know who it hit? A. No, I didn't.

Q. Did you recognize who the box hit? A. No, I didn't.

Q. Did you later find out who it was? A. Yes, I did.

Q. Who was it that the box hit? A. Plaintiff.

The Court: You mean Mr. Castellano?

The Witness: Yes.

Q. Before this box fell, had other boxes fallen down?

(43) A. Yes, they had.

Q. When these boxes had fallen down, do you know whether there were any officers or mates where those boxes fell? A. Once there was a mate when one fell.

The Court: On the same day?

The Witness: On the same day, yes.

*Willie Jackson, for Plaintiff, Direct*

Q. And did the mate say anything to you about it?  
A. No, he didn't.

Q. Did you say anything to him about it? A. No.  
(44) Q. Have safety helmets been issued to the long-shor men? A. Yes.

Mr. Sergi: Objection.

The Court: Sustained. Disregard that. That's improper, Mr. Bushlow.

Mr. Bushlow: Before I ask the last question, your Honor, may we have a conference.

The Court: Yes.

(A side bar discussion is held out of the hearing of the jury.)

Mr. Bushlow: Your Honor, if after this accident did they use safety nets, my purpose for this is to show this entire operation was an unsafe operation. I can show it by what happens afterwards.

Mr. Sergi: No.

The Court: Like the railroad cases, you can't take anything and call it unprotected and show afterwards they put gates on or something contributed. It showed negligence. This is a question of negligence and a question of negligence you can't take subsequent predication and take them and relate them to prior—

Mr. Cichanowicz: Even unseaworthiness, I (45) can't see unfit at the time. You don't see what the practice was later on.

The Court: Right. The nets as I see it, seaworthiness is a condition and—

Mr. Bushlow: Standing of a reasonable—

The Court: That's your U. S. safety regulations?

Mr. Bushlow: Not all the time, no, sir. There are a lot of things—

*Willie Jackson, for Plaintiff, Direct*

The Court: I'm not going to allow it, Mr. Bushlow.

Mr. Bushlow: There is a custom and practice and that custom and practice is negligent.

The Court: Both of these gentlemen have testified up to this accident they never used—

Mr. Hart: That was the custom.

Mr. Bushlow: But I want to show, even though it was the custom and practice that doesn't mean it was.

The Court: That you bring in with an expert, not through this witness.

Mr. Bushlow: I got a man, I have the next witness on that.

The Court: Expert maybe but not this witness.

Mr. Bushlow: By an expert, the man's been (46) doing this for 25 years. I'm qualifying him as an expert.

The Court: No.

Mr. Bushlow: Who would be an expert? Who's a better expert?

Mr. Sergi: We're not going to tell you.

The Court: Someone who operates a foot pedal, that's not an expert.

Mr. Bushlow: The man's been doing it 25 years.

Mr. Cichanowicz: Is that the guy who dropped the—

Mr. Sergi: No. This guy.

Mr. Cichanowicz: Other guy was it—

Mr. Bushlow: I'm going to try to qualify him, your Honor, if you overrule.

The Court: If they object I'm going to sustain it.

(The following takes place in the presence of the jury.)

Mr. Bushlow: No further questions.

*Willie Jackson, for Plaintiff, Cross*

*Cross Examination by Mr. Sergi:*

Q. Mr. Jackson, do I understand that the box that the plaintiff here dropped from your conveyor? (47)

A. Yes, it did.

Q. Will you tell us again, please, how that fell off?

A. It was tumbling over and over.

Q. Do it slow. A. Over and over like this.

(Witness indicating.)

Q. What caused it to fall over? A. Once you start the belt it jumps.

Q. Once you start the conveyor? A. Yeah.

Q. It jumps? A. Yeah.

Q. And that's what happened here? A. Yes sir.

Q. You started off the conveyor and the boxes jumped?

A. The boxes turned over like—(indicating).

Q. Backwards? A. Backwards.

Q. And it rolled down the conveyor? A. Yes, started tumbling down. It hit the next box behind and it went over.

Q. You had stopped your conveyor? (48) A. Yes.

Q. Right. And you're between A and B? A. Yes, I am.

Q. And when you stopped your conveyor, there were boxes on the conveyor? A. Yes.

Q. Nothing fell off when you stopped the conveyor?

A. No.

Q. Nothing fell off while the conveyor was working and the boxes were coming up to your deck? That box did not fall off? A. I didn't understand you.

Q. What? A. I don't understand what you're saying.

Q. You had a conveyor—withdrawn.

Were you on A deck? A. Right.

Q. There was a large machine conveyor from A deck, let's say, A deck is up there, okay? A. Right.

Q. A deck down to B deck? A. Yeah.

*Willie Jackson, for Plaintiff, Cross*

Q. And there was another conveyor from B deck down to C deck? (49) A. Yes, there was.

Q. Another conveyor from C deck down to D deck? A. Yes.

Q. And the boxes were coming from D deck? A. Yes.

Q. On the conveyor, coming up from D to C and from C to B and from B to A? A. Right.

Q. Right? A. Right.

Q. And these boxes were coming up and something happened and you stopped your conveyor? A. Yes.

Q. When you stopped your conveyor, there were boxes on the conveyor? A. Yes.

Q. Up to that point the boxes did not fall off yet? A. No.

Q. And the box fell off when you started off the machine and it started off quickly? A. Yes.

Q. Now the box began rolling down the conveyor? A. Yes.

(50) Q. And went from box to box to box and then it fell off? A. No.

Q. Did it hit another box on the conveyor? A. Yes, it did, only one box.

Q. One box? That's when it fell off the side? A. Yes.

Q. It didn't fall off until you started the machine? A. Right.

Q. And it didn't fall off because the sides were too small, it fell off because you started the machine and it rolled down and hit another box and then, fell off; is that right? A. Say that again. I'm sorry. I didn't understand you.

Q. You don't understand me? Would you read it please?

(The question is read back.)

A. Well, I guess so.

*Motions*

Mr. Sergi: No other questions.

Mr. Cichanowicz: No questions.

Mr. Hart: No questions.

Mr. Bushlow: No questions, your Honor.

- (50a) The Court: You may step down, Mr. Jackson.

(The witness is excused.)

\* \* \*

- (224) Mr. Cichanowicz: I think I'll go first, may it please the Court, the defendant respectfully moves to dismiss the complaint on the ground that the plaintiff has failed to make out a *prima facie* case with respect to negligence as well as with respect to the claim of unseaworthiness.

- (225) Now with this motion I also join a motion for a directed verdict with respect to both causes of action. According to the evidence and the only evidence in this case, as to how the accident occurred, it appears that a box was caused to start toppling and as it toppled it hit another container and fell into the hold below.

According to the witness Jackson, this occurred when he started the conveyor. Under these circumstances, I respectfully submit under the Osser case, there is neither negligence or unseaworthiness on the part of the vessel. This accident was due to, say, the isolated act of a fellow employee and therefore, under the Osser decision, there is neither negligence or unseaworthiness; no basis for liability against the vessel.

This is according to the evidence, the proximate cause and the only proximate cause of the accident.

The testimony with respect to sides or whatever they were called on the conveyors, nets, et cetera, in no way caused or contributed to the accident.

*Motions*

The Court: What about insufficient personnel?

Mr. Cichanowicz: I would say insofar as (226) insufficient personnel, this also is not a contributing cause. Whether there was somebody present there or not.

The Court: Have you ever read Burr against Commercial Travel?

Mr. Cichanowicz: I would say I probably have not or if I have, I don't recall.

The Court: Or Pauls Graph against Long Island Railroad?

Mr. Cichanowicz: Yes, I have.

The Court: Both the same type of cases where you have one event which leads to another. As I understand Mr. Bushlow's arguments on insufficient personnel. If there had been a man at Point B, Point A, the foot pedal man and a man at Point B, this sequence wouldn't have occurred. Wouldn't have had this accident. That's an insufficient personnel argument, is it not, Mr. Bushlow?

Mr. Bushlow: That's right, that's exactly so, your Honor. Besides all the other arguments.

Mr. Sergi: This is the first time we—

The Court: He submitted a memorandum.

Mr. Bushlow: I haven't given them a memorandum of law.

(227) Mr. Sergi: We don't know what his arguments are.

The Court: As one of the arguments, I understand it to be that under the system that the Bay Ridge set up on B deck, there will be a man at Point A and at Point B, the A man would be at the top of the shoot coming up from C deck, he would be operating the foot lever to run the conveyor.

*Motions*

The man at Point B would take the boxes, make him do a proper turnaround the corner, to go up the A deck.

And the man at Point B was not there when your mate came down and they had some problem. And I wouldn't go any further than to say they had some problem with the machine when your mate was there and he observed this whole performance and he observed the insufficient personnel, he did nothing about it.

And the man at point B continued to be absent when this shortly thereafter, this event occurred. And his point is that that defect not only was unseaworthiness, was evidence of unseaworthiness, that insufficient personnel, which ~~the~~ case seems to say, insufficient personnel too, is evidence of unseaworthiness, but also it may have been (228) negligence on your part because you were aware of it. And this was the beginning of the chain of events which culminated in the plaintiff being hit on the head.

Much as the same as in Burr against Commercial Travel or Pauls against Long Island Railroad.

Mr. Cichanowicz: I don't believe there is any causal relationship. Assuming the circumstances are as Mr. Bushlow says, the man was there, he was absent, he should have been there, that is not the cause of the accident. There was actually, if you want, I shouldn't say intervening cause, but a separate independent cause which made this box fall.

This conveyor was stopped on many occasions.

The Court: The conveyor was stopped because the box was out of line or wasn't going up properly. Then the fellow came over and rectified it from Point A and then it started again with the jump, which

*Motions*

caused the—it wasn't the box, it was out of line, it was the box behind it, I guess, that was out of line, that he started.

Mr. Sergi: There is no testimony here at all.

The Court: Yes, there was.

(229) Mr. Sergi: Nothing at all.

The Court: That is precisely the testimony as I recall it. I think you got just that kind of a situation here.

Mr. Cichanowicz: I don't—

The Court: Subject to my reading of the Jackson testimony, that's why I think we have some material differences as to what Jackson said, that's—

Mr. Bushlow: That's my recollection.

Mr. Cichanowicz: I don't think under the—

The Court: Okay.

Mr. Cichanowicz: This can be negligence, that the man was not there and that a certain event happened. To say that he knew he could have or should have done something else would have happened.

I mean, this is putting him in a situation where he has to—

The Court: Mr. Bushlow, did Mr. Jackson say when the first of these jam ups occurred, that there was a similar fall?

Mr. Bushlow: As I recollect, oh, no. The mate was there and he saw it.

Mr. Sergi: And the question—

Mr. Bushlow: No, no. He said the mate was (230) there and they saw there was nobody down there.

The Court: He saw a jam up occur and he saw the machine have to be stopped.

Mr. Bushlow: Right.

The Court: And the man from Point A run to correct it.

Mr. Bushlow: Correct.

*Motions*

Mr. Cichanowicz: Presumably it was started.

The Court: At least insofar as negligence, if there wasn't a fall on the first occasion, how could the mate anticipate?

Mr. Bushlow: He saw it fall before that.

Mr. Sergi: Not the same fall.

Mr. Bushlow: Jackson's testimony will say that some time after 6:30 or 7 when he started on these boxes, the mate had come down to look at the decks to see what they had to climb up, saw the boxes fall off.

The Court: That's my recollection.

Mr. Cichanowicz: That I say, that if that may be the testimony, even if it is, and I'm not saying it, under those circumstances, if the boxes just fell from a situation as the witness testified, when he says the mate was present, possibly there might be negligence, but here we have something (231) else happening.

Suppose somebody threw the conveyor down into the hatch. You mean to say because the mate was there and he saw boxes fall he should anticipate something would have happened to this conveyor this is the same darn thing.

The Court: If boxes were falling and they were attributable to the stopping and starting of the machine, which is the impression I got, then I think you may be in trouble anyway, that's the first question I had, whether you are prepared to meet that insufficient argument because I think that's one question.

Now, the insufficiency at the sides at the moment, he's got testimony that the sides' guardrails on the conveyor belt from deck B to deck A are smaller than those from C to B and D to C.

*Motions*

What inference a jury may draw from that, whether your argument is as I understand it, is that there is no proof to show had they been the same size from D to C and C to B, they wouldn't have fallen anyway, except there is no testimony by anybody that any of the large cartons fell from either of those two conveyors—all falls occurred from B to A. (232) I think that it may be enough to carry it.

Mr. Cichanowicz: Well your Honor, the other thing is this: He said they were too small. Now we have an accident happening not because assuming they were—not happening because of that, because of some other condition.

Now we are getting into this condition where to what extent should or how large or how big these side things should be. Side pieces be, in other words—

The Court: Increase the size of the boxes?

Mr. Cichanowicz: May have to, have one larger to prevent an accident, there is no requirement under the law, this is what we are getting involved in now.

The Court: You have increased the side of the boxes within recent months and he says having made that increase, you should have made an adjustment in the conveyor belt size.

Mr. Sergi: Can I be heard, your Honor? Now that you are—

The Court: Wait a minute, he is still arguing. That's his two main arguments as I understand it.

Put the nets aside, I don't know what to do about the nets. I think I've got to hear more on (233) the subject of nets.

Mr. Cichanowicz: Basically these are my positions on this, I don't think there is any evidence that sus-

*Motions*

tained either negligence or unseaworthiness under these circumstances; this is another situation. In that it is stretching both negligence and unseaworthiness to put the ship owner in the position here where he's made out a *prima facie* case.

In other words, as we have indicated, we have to anticipate that something different is going to happen than what's happening at the time they say the mate was there.

The sum and substance of the whole argument, and insofar as the boxes, insofar as the side pieces are concerned, evidently these were sufficient to contain the boxes during the normal operation.

The Court: His testimony there was a number of falls from this—

Mr. Cichanowicz: But the accident happened because of that, during the normal operation of this conveyor, this box didn't fall and hit this man, that's what we're concerned with. What may have happened before, what happened afterward, (234) is besides the point. The fact is they had nothing to do with this box falling.

Mr. Bushlow: Where was the abnormal operation when it happened; what was abnormal about it? He didn't have a man to straighten it out.

Mr. Sergi: There is absolutely no proof. Can I argue now?

Mr. Bushlow: One more thing about it.

The Court: Wait a minute.

Mr. Sergi: Let me finish.

Mr. Bushlow: All right.

Mr. Sergi: I would like to make my contribution.

Your Honor, primarily I am going to make a motion to strike out any testimony regarding the absence of a net. There is no testimony here whatsoever that a net was necessary, in fact, the—

*Motions*

The Court: I want to hear testimony, expert, on that subject. I am not going to resolve it on that question at this point. I am going to resolve it on these other two questions, whether to let it in, it is going to the jury, I will hear your experts, if I let it go to the jury, we will make a determination.

Mr. Sergi: On the plaintiff's case, I am now (235) moving on this.

The Court: I'm not, at the moment, it is still relevant. If other questions are relevant.

Mr. Sergi: May I make my argument, your Honor. The plaintiff's case is in. And the only testimony here about absence of nets came from the plaintiff.

Then the plaintiff testified that over twenty—

Mr. Bushlow: Jackson testified.

Mr. Sergi: Just a minute, you'll have a chance.

The plaintiff testified that customer use throughout the entire twenty years, that he worked there, was not to put up a net, and they never put up a net and therefore no net was necessary. Therefore, I think with just that proof and nothing more, the Court should strike out the testimony because it had nothing to do with this accident; unless someone came here on behalf of the plaintiff and testified the absence of the net was the contributing factor in this accident, which is, absence here, therefore, I move to strike that testimony.

The Court: What did you do about the (236) standard, the U.S.?

Mr. Sergi: What?

The Court: Safety.

Mr. Sergi: The standard in the regulations which Mr. Bushlow submitted to the Court, refers to when two gangs are working above different levels. In this case, there were not two gangs; there was one gang.

*Motions*

The Court: That's the definition.

Mr. Sergi: The same men working at different levels was not part of the regulations when it was written as anticipated; they are talking about two gangs.

The Court: I don't think it has to be interpreted that narrowly. I understand what you are saying, but I don't think it has to be read that narrowly.

The question is whether some question of negligence that there wasn't a net there. Your proof is going to show this,—it wasn't a practice in the shipping industry. That will conform to the defendant's proof.

At the end of the defendant's case, your motion may be well taken, but at the moment, I don't think it is.

(237) Mr. Sergi: No proof here it was necessary. Here is a question asked of the plaintiff.

The Court: I heard the questions asked of the plaintiff on the question of nets. That doesn't—you still have this regulation to—

Mr. Sergi: The regulation doesn't pertain because there were not two "gangs" working here.

Mr. Hart: Only one gang.

Mr. Sergi: One gang working here.

The Court: That depends on the word "gang", I think, that word can be read in terms of two gangs, meaning two groups of people and there were two groups of people on each deck.

Mr. Sergi: Not two groups of people, supposed to be two people each deck, in fact only one person on each deck, how can you interpret that to mean two different gangs?

The Court: I think it's up to the jury. That's a question I am troubled with, as to whether to submit

*Motions*

that question ultimately to the jury, I am not going to make that decision at this point. And, I am not going to strike the testimony.

Mr. Sergi: I move to strike any testimony regarding the size of the side rails inasmuch as there is no testimony whatsoever here that they, (238) besides the size of the side rails had anything to do with this accident. I don't think the plaintiff should be allowed the opportunity to have a shotgun type of theory of liability. I think the defendants ought to have specifically what the plaintiff's cause caused this accident.

Now as I understand the testimony, one witness here who testified as to the happening of this accident either knew nothing about it, they were down in the lower hold of D deck. Now the only man who here knew anything about how this accident happened was Mr. Jackson and the only testimony from Mr. Jackson as to how this accident happened was when he stepped on that pedal to restart the conveyor, a box jumped, tumbled, struck another box and then fell over.

Now, I don't know how anyone can prevent that from happening by having higher sides. You would have to have the entire conveyor enclosed in a chute, so that nothing could possibly bounce out. There was no testimony here that this box fell because the sides were not high enough.

The Court: I don't know. I think there is enough taken, all the inferences most favorable, to let that question go to the jury.

(239) Mr. Sergi: I think the Court is stretching the issue, just a little bit.

The Court: I am not stretching the issue, not at all. You have a Cabana box used for years with a lower height. You then raise the height of the box

*Motions*

and you don't raise the height of the sides. And Mr. Bushlow's point is this: You can draw from that alone, you could draw an inference that some negligence on the part of your—

Mr. Sergi: But you've got to give us proximate cause of the accident.

Mr. Bushlow: There is no—there is A and we have five A's.

The Court: He's got several that he says were in the course of the series of events that occurred.

Mr. Sergi: I don't think this is fair. I don't think it's fair to the defendants. I would like to now—I would like to see a memorandum from the plaintiff.

The Court: Wait a minute, wait a minute. There can be more than one proximate cause of an accident.

Mr. Sergi: Which one he is using—

The Court: Using them all.

(240) Mr. Sergi: As I understand,—

The Court: Burr against Commercial Travel—

Mr. Sergi: I know the case. But I want to know what we are defending against. We are defending against the fact that there was inadequate or insufficient men attending the conveyor, that's one; then we have the fact that the sides should have been higher.

The Court: Two, conveyor belt jumped, didn't operate smoothly. Three, that you had higher side boxes wouldn't have gone over this higher box, couldn't have gone over.

Mr. Sergi: Where is the proof of that?

The Court: You said you could draw from the fact none of this happened on B to C; D to C deck, this didn't happen with the Cabana boxes.

Mr. Sergi: But none of the lower decks had ever stopped and restarted.

*Motions*

The Court: Yes, they did, everyone of them stopped. Everytime these events—everyone of these—

Mr. Sergi: The conveyor—there is no testimony.

The Court: Sure there is on the fact—Mr. Jackson said when he stopped his—then—they had all stopped, all the way down the line and the (241) guy came over from A deck, stopped his, from A point to B point. You didn't listen to his testimony.

Mr. Sergi: There is no testimony that he or anyone else that had on prior occasions stopped any of the conveyors absolutely known.

The Court: You or I misread that or misheard that testimony.

Mr. Sergi: All he said when he stopped, they stop. And he never he stopped at any prior occasion.

The Court: Yes, he did.

Mr. Sergi: Of course we will have to read that testimony again.

The Court: I join the defendant's representing the shipowner in that the only cause of this accident was the one isolated act by Mr. Jackson, who is the employee of Bay Ridge. Absent his act, this accident would never have happened.

I don't see it that way.

Mr. Sergi: Of course.

The Court: During viewing it from Mr. Bushlow, I have got to view it from Mr. Bushlow's standpoint as I see Mr. Bushlow. I think he made out his *prima facie* case, I will reserve decision at this point.

(242) Mr. Sergi: I move to dismiss on the grounds of Usler against Ichaback (phonetic), your Honor, I submitted a memorandum to the Court, and I would like to have it marked as an exhibit.

*Motions*

The Court: I have read it.

Mr. Sergi: Defendant's exhibit—

Mr. Bushlow: Mark it a Court exhibit.

The Court: Defendant's exhibit.

The Clerk: Double F, for identification.

(Whereupon a memorandum is received and marked Defendant's Exhibit double F for identification.)

The Court: Okay, we're ready to go.

Mr. Bushlow: As your Honor has—

Mr. Hart: I haven't made mine. At this time, on behalf of the third-party defendant, Bay Ridge Operating Company, I join in the motions made on behalf of the shipowner and co-third-party defendant.

The Court: I will reserve.

Mr. Bushlow: At this time, your Honor, the plaintiff moves for a directed verdict.

The Court: Well, I will reserve on that also, at this point. I have to deny that at this point.

Mr. Bushlow: No, you can reserve.

The Court: Reserve.

(243) Mr. Bushlow: I make that to protect my motion at the end of the entire case, your Honor.

The Court: I will reserve on all motions and hear from the defendants.

Mr. Bushlow: I presume, gentlemen, that you are going to introduce some experts now?

Mr. Sergi: Have you rested?

Mr. Bushlow: I told you outside of subject to a 2 o'clock doctor, and any rebuttal.

Mr. Sergi: I want to know, your Honor, since the plaintiff has not rested, whether the plaintiff expects to put in other witnesses in their direct case?

Mr. Bushlow: No.

*Anthony Nicotro, for Defendant, Direct*

The Court: No, except for the doctor.

Mr. Bushlow: I said I finish my direct case.

Mr. Sergi: I don't know—

The Court: This doctor, he's got one more doctor.

Mr. Sergi: He says he has a witness.

The Court: For rebuttal.

Mr. Bushlow: That's not a direct case, Mr. Sergi.

The Court: He may have a witness for rebuttal, if you put any witnesses on.

\* \* \*

(247) the defendants will call a witness.

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Thereupon the defense, further to maintain the issues on its part to be maintained, called as a witness ANTHONY NICOTRO, who, having been first duly sworn, was examined and testified upon his oath as follows:

*Direct Examination by Mr. Sergi:*

Q. Mr. Nicotro, would you tell us what your present occupation is. A. I am Terminal Superintendent for Standard Food Company.

Q. What is Terminal Superintendent? A. I am in charge of distribution of fruit to trucks, loading of trucks.

Q. How long have you been at that job? A. Oh, approximately 13 years.

Q. In 1970, what particular pier were you working at? A. 1970. Pier 42, East River.

Q. And you had worked at Pier 13 prior to that? A. Yes, I did.

Q. And did Standard Fruit employ the same (248) stevedores at Pier 13 as they did at Pier 42? A. More or less.

*Anthony Nicotro, for Defendant, Direct*

Q. Was Bay Ridge one of the stevedores that was used?  
A. Yes.

Q. Stevedores at that time in '70? A. In 1970, yes.

Q. And did you know any of the men that worked for Bay Ridge, the stevedores at that time? A. Longshoremen?

Q. Yes. A. Yes.

Q. Did you know the plaintiff here? A. Yes.

Q. Castellano? A. Yes.

Q. And how long have you known Mr. Castellano? A. Oh, a good 20 years, I'd say, close to it.

Q. Are you familiar with the kind of work Mr. Castellano had been doing prior to 1970? A. Yes.

Q. What kind of work did he do? A. Electrician.

Q. Are you familiar with the kind of work electricians do in that area? (249) A. Yes, more or less.

Q. Now, what do electricians—withdraw that.

Are you familiar with the work they do on conveyors?  
A. Well, not particularly involved with me, some parts of it.

Q. Generally. Are you familiar with the conveyor that was used by Bay Ridge during that time? A. Partially.

Q. Do you know whose machines they were? A. Yes.

Q. Whose machines were the conveyors? A. Standard Fruit Company.

Q. Were they given to Bay Ridge to do work aboard vessels and unload ships? A. Yeah, they were.

Q. How long before 1970, had the machines, the conveyors we are talking about, been given to Bay Ridge to use in discharging cargo of bananas. A. Well, machines I would say, about 15, 20 years old, I would say approximately.

Q. At that time? A. Oh, no.

Q. Now? A. Maybe now they might be 20 years old.

(250) Q. And when were they first given to Bay Ridge, if you know, to be used? A. 1969, December.

*Anthony Nicotro, for Defendant, Direct*

Q. Now from all that time in 1969 up through January of 1970, were all these machines that were used by Bay Ridge kept by Bay Ridge? A. Yes.

Q. Did they store them somewhere? A. Yes.

Q. Where did they store them? A. On a barge which we call a "J," Pat keeps all our equipment.

Q. And that barge is kept between the dock and the vessel when the vessel comes in; is that right? A. Correct.

Q. And who maintains those machines during the period of time, 1969 through January 1970? A. The stevedore.

Q. Bay Ridge? A. Bay Ridge.

Q. Did Standard Fruit have anything at all to do with any of the machines that were given to Bay Ridge to be used for discharging vessels from 1969 through January 1970? A. No.

Q. Never? (251) A. Nothing.

Q. Is that correct? A. Correct, sir.

Q. And when a vessel would come into the New York Harbor discharging bananas, who would make the determination as to which of the machines were to be put aboard the ship in order to discharge the bananas? A. The stevedore, Bay Ridge.

Q. And during the discharge, did Standard Fruit have anything to do with the discharge of the cargo? A. Other than productivity, no.

Q. Would you go aboard the vessel and show them how to handle the cargo or the bananas or conveyors? A. No.

Q. Nothing whatsoever? A. No.

Q. And it was—withdraw that.

It was the hatch boss, was it not, that would determine which machines would be put in which particular hatch? A. Yes.

Q. Is that correct? A. Yes.

Q. It was also the hatch boss, these are people that work for Bay Ridge; is that correct? (252) A. Yes.

*Anthony Nicotro, for Defendant, Direct*

Q. They would decide how these conveyors would be put in the hatch? A. Correct.

Mr. Bushlow: If your Honor please, I haven't objected so far, but frankly every question was a leading question.

Mr. Sergi: I will desist leading any further. I thought I was saving time.

Q. (By Mr. Sergi) Now, tell us who would make the determination as to how the cargo would be discharged from the ship. Who would do that? A. The stevedores.

Q. That's Bay Ridge? A. Bay Ridge.

Q. Now, were you familiar with those conveyor machines prior to 1969 and through 1969, through 1970, were you familiar with their size and their dimensions? A. More or less.

Q. And were you familiar with—withdraw that.

Were there sides on these machines? A. No, there were no sides on them, no.

Q. Were there on the conveyors, were there sides that would fold down, come up? A. Yes.

(253) Q. I show you Plaintiff's Exhibit double A in evidence and there is one, two, three, four photographs in there. Are those photographs of the conveyor machines that were used by Bay Ridge during the discharge of cargo? A. They were.

Q. Were those the same machines that were given by Standard Fruit to Bay Ridge prior to 1970? A. Yes.

The Court: Wait a minute. I thought the testimony was he gave them in December of '69.

Q. (By Mr. Sergi) I meant December, withdraw the question.

Were those machines given to Bay Ridge around December of 1969? A. Yes.

*Anthony Nicotro, for Defendant, Direct*

Q. Are they the same machines that were kept by Bay Ridge through that time, from December 1969 through January, 1970? A. Yes.

The Court: So that's a two-month period.

Mr. Sergi: Pardon?

The Witness: Two.

The Court: Two-month period?

Mr. Sergi: Yes.

Q. (By Mr. Sergi) Did those machines have sides? (254) A. Yeah, they do.

Q. And would you tell us the size of the sides on the machines that had collapsible sides? A. Approximately four inches.

Q. I have a ruler and would you use this board, please, these pieces of cardboard at the bottom, would you measure off four inches off and make a straight line.

Have you made a straight line? A. Yes, I have.

Q. Four inches? A. Four inches.

Q. There has been some testimony in this case that in hatch number one, between—

The Court: Number two, two.

Q. (By Mr. Sergi) Between deck A and B.

Mr. Bushlow: Hatch number two.

Q. (By Mr. Sergi) I beg your pardon, and I withdraw the question.

In hatch number two between A deck and B deck, there was a different kind of machine. It was a machine where the side would not fold over. It was perfectly permanent and secured to the side of the machine; are you familiar with that machine? A. That is right.

Q. Are you familiar with the height of the sides (255) of that machine? A. Approximately three and a half inches.

*Anthony Nicotro, for Defendant, Direct*

Q. Would you measure three and a half inches, please, the same type, make a line.

Now, in 1970, Standard Fruit was having brought here, by ship, boxes of bananas. Can you tell us where they were coming from? A. They were coming from Honduras, Costa Rica and Ecuador.

Q. And did these boxes have names as to which size. Box or type of boxes? A. No, they did not, all it had was an emblem.

Q. The name of it? A. Trademark of the product.

Q. Now have you ever heard the name Cabana boxes? A. Yes, I had.

Q. What did that mean? A. That was our trademark.

Q. Trademark? A. Trademark.

Q. Did the trademark indicate the height of the box? A. No, it did not.

Q. Now were there other trademarks also? A. No.

(256) Q. Did you have some boxes around January of 1970 that came from another place which was of a different size? A. Yes.

Q. What was that called? A. That was called a Sula box, primarily because it came from Sulavohley (phonetic) in Honduras.

Q. Now, do you know the measurements of the Cabana box and the measurement of the Sula box as they were in January of 1970; yes or no? A. Yes.

Q. Now will you tell us the measurements of the regular box in height, if you know, all the dimensions if you know, but we are more concerned with the height of the box. A. The height of the regular box?

Q. Yes. A. It was eight and a half inches.

Q. Eight and a half inches? A. Eight and a half inches.

Q. With that ruler and that piece of cardboard on the other side, please, maybe we can—withdraw the last question.

*Anthony Nicotro, for Defendant, Direct*

You made two marks on this box? A. Yes.

(257) Q. The four inches, which is the three and a half? A. This is the four.

Q. Would you mark four inches on this one and three and a half on the other.

Thank you.

Now, on the other side of this cardboard, would you mark off the measurements for the height of the regular box or the Cabana box. Have you done that? A. Yes, I did.

Q. Now, you know the size of the Sula box; do you not? A. Yes, I do.

Q. What was that? A. Nine and a quarter.

Q. What was the difference in the measurements? A. Three-quarters of an inch.

Q. You would measure that and make a line. Would you indicate, the name Cabana and Sula in the different measurements, please. A. Let's not get confused between Sula, there is no such box called Sula, it is where the box comes from, Sulavohley (phonetic), but it's all one box, Cabana.

Q. The Sula is a little higher? A. The Sula is a little higher.

(258) Q. Would you put the name Sula on there. Have you done that? A. Right.

Q. Now, is the latter—Standard began to bring in another band called the Dole; is that correct? A. Correct.

Q. Now, these photographs were taken at the date indicated, I am talking about Exhibit double A, they were taken September 23, 1974 and the packages in here are Dole; is that correct? A. Yes.

Q. There is a Dole box higher, smaller, same as, any of the boxes that you have mentioned before? A. This is the high box.

Q. A higher box? A. Right.

*Anthony Nicotro, for Defendant, Direct*

Q. Now what's the size of the box that is in the photograph? A. Nine and a quarter.

Q. Height? A. Height.

Q. That is the same as the so-called Sula box? A. Yes.

Q. As I indicated in the photograph, and where you are looking at number four of the double A, is that the (259) manner in which the boxes are discharged using the conveyor? A. Yes, they are.

The Court: Wait a minute, wait a minute, Mr. Sergi. Is the dole box—what is its height?

The Witness: The height of the Dole box—

The Court: Yes.

The Witness: Nine and a quarter.

The Court: The Dole is nine and a quarter also.

Q. (By Mr. Sergi) Now, when did Standard Fruit start to bring in the Dole Grand box?

Mr. Bushlow: If your Honor please, I object, this is all after the accident.

The Court: Sustained.

Q. (By Mr. Sergi) I ask you to look at Plaintiff's Exhibit 4. Do you see in that photograph the box? A. Yes.

Q. And what brand is that box? A. Dole.

Q. When did you start bringing in Dole?

Mr. Bushlow: I object, your Honor.

Mr. Sergi: Your Honor,—

The Court: I will allow it in the light of the fact that that exhibit was of this particular—was (260) identified as the particular B to A deck conveyor involved.

Mr. Bushlow: Conveyor, nothing was said about the box.

*Anthony Nicotro, for Defendant, Direct*

Mr. Sergi: And the box.

The Court: The inference was given to me rightly, wrongly, that was taken out at B, the time of this happening.

Mr. Sergi: Exactly, your Honor.

Q. (By Mr. Sergi) Now, that's a Dole box there; is that correct? A. Yes.

Q. Now, tell us when Standard first started bringing in Dole? A. February of 1972.

Mr. Bushlow: If your Honor please, may I say that could not have been a picture taken at the time of the accident if Dole boxes were brought in in '70, I ask that it be stricken.

The Court: No, I am going to allow it.

Mr. Sergi: What be stricken?

Mr. Bushlow: The question and answer.

The Court: The answer will stand.

Mr. Sergi: Thanks very much.

Q. (By Mr. Sergi) Now, in that photograph which is Plaintiff's Exhibit 4, is that Plaintiff's Exhibit 4?

(261) The Court: Yes, what is it?

The Witness: Four.

Q. (By Mr. Sergi) Four, thank you.

Do you see the conveyor in that photograph? A. Yes, I do.

Q. Is that the conveyor that you used in Hatch No. 2 between A and B deck? A. Yes.

Q. That is the conveyor with the three and a half inch high side? A. Correct.

Q. And before Bay Ridge started doing the discharging for Standard Fruit, who was doing the discharging for Standard Fruit?

*Anthony Nicotro, for Defendant, Direct*

Mr. Bushlow: I object, your Honor, it is immaterial as to who was doing it prior to the date of the accident.

Mr. Sergi: Your Honor, I want a side bar conference.

The Court: Yes, I don't see the materiality myself.

(Whereupon the following takes place at side bar out of the hearing of the jury:)

Mr. Sergi: Your Honor, I want to point out custom practice, these conveyors have been used for 15 or 20 (262) years and—

The Court: That testimony has already been in evidence. You can ask him that, but your question is who was doing the work prior to Bay Ridge that's the only thing he objected to, was who thought the practice—

Mr. Hart: Was the work done by other stevedores?

Mr. Sergi: I got to point out somebody did it.

The Court: Somebody else is doing it prior.

Mr. Sergi: If that's his objection, is that your objection? All right.

Mr. Bushlow: He already testified—

The Court: Do you have any objection to Standard Fruit?

Mr. Bushlow: Sure I have, your Honor.

The Court: All right.

Mr. Bushlow: I will adopt it, I will change it.

(Whereupon the following proceedings are resumed within the hearing of the jury:)

Mr. Sergi: I withdraw the last question.

Q. (By Mr. Sergi) Now prior to Bay Ridge using those conveyors, to discharge boxes of bananas, there were other stevedores that did the same work; is that correct?

*Anthony Nicotro, for Defendant, Direct*

(263) Mr. Bushlow: When?

Q. (By Mr. Sergi) Prior to December of 1969. A. Yes. there were.

Q. And the other stevedores that did the same kind of work prior to December of 1969, did they use the exact same conveyors? A. Yeah.

Q. All the exact same conveyors that were given to Bay Ridge on December of 1969? A. Yes.

Q. Now, Bay Ridge is no longer in operation; is that correct? A. That's correct.

Mr. Bushlow: Object, your Honor, it is immaterial.

The Court: It is immaterial, but it is all right.

Q. (By Mr. Sergi) There are others who are now doing the same kind of work for Standard? A. That's correct.

Q. Discharging the Dole boxes of bananas? A. Yes.

Q. Are they using the same kind of conveyors that have been used by Bay Ridge from December of 1970 through January of 1970? (264) A. Yes.

Q. Exact same one? A. Yes.

Q. Is that correct? A. Yes.

Q. There have been no changes made to any of the conveyors?

Mr. Bushlow: If your Honor please, he is leading the witness.

The Court: Sustained.

Q. (By Mr. Sergi) I withdraw the question.

Have there been any changes made to any of these conveyors that have been used prior to December of 1969 up to the present time? A. No.

Mr. Sergi: I have no further questions.

Your Honor, I don't mean to interrupt, I did want to show the cardboard with the measurements on it

*Anthony Nicotro, for Defendant, Direct*

to the jury, so they can see exactly what was marked by the witness with the Court's permission. Before I do that, I would like to offer it in evidence.

The Court: It might be wise.

Mr. Bushlow: Your Honor, I will assume the jury knows four inches.

The Court: Do you have any objection?

(265) Mr. Bushlow: No objection, your Honor.

The Clerk: It will be double B-1, diagram received in evidence as Defendant's exhibit.

(Whereupon a diagram is received and marked Defendant's Exhibit double G-1 in evidence.)

The Court: I don't know whether it's worth taking the jurors time, if you want to pass it in front of them, it is all right with me.

Mr. Sergi: I will walk in front of them.

The Court: I think they know what the testimony is, but you can just go in front and show them each side. Show them each side.

Mr. Sergi: I don't quite understand the—do you mind if I finish, Mr. Bushlow?

Mr. Bushlow: I don't mind at all, Mr. Sergi.

Q. (By Mr. Sergi) You have marked here regular box and Sula box? A. Correct.

Q. Where did you measure the eight and a half from? Where did you measure it from? Oh, I see, would you put a line across where you started the measurements. And where did you mark—make a box. A. All the way across.

Q. Where did you measure four inches from, here to here? (266) A. Yes.

The Court: Before you show it to the jury, show it to Mr. Bushlow and make sure he has no objection.

*Anthony Nicotro, for Defendant, Cross*

Mr. Bushlow: It looks all right to me, I have no objection. Are we finished, Mr. Sergi?

Mr. Sergi: Yes.

*Cross Examination by Mr. Bushlow:*

Q. Mr. Nicotro, you say in the past 13 years you have been in charge of loading trucks? A. Yes.

Q. In answer to Mr. Sergi, when Standard has anything to do with loading, you are unloading the ship, you said outside or other than productivity. What did you mean by that? A. Well, we want to try to maintain a certain pace.

Q. That's it. You want to get the bananas off as fast as they can? A. As best we can.

Q. Fast as they can?

Mr. Sergi: Objection.

The Court: No, cross examination.

Mr. Bushlow: Please, Mr. Sergi.

(267) Q. Mr. Sergi: Pace doesn't mean fast, your Honor.

The Court: He is entitled to ask the question.

Q. (By Mr. Bushlow) Who are these men, longshoremen? A. Hourly.

Q. Quicker they get them off, the more money your company makes? A. It makes sense.

Q. It sure does. In answer to Mr. Sergi's question, you told us there were two boxes, a Cabana or regular box and a Sula box; is that right? A. That's right.

Q. Were there any other kinds of boxes? A. No.

Q. That's all? A. There were pineapples, but we didn't have them there.

Q. Pineapple boxes. What about banana boxes? A. Other than what we are speaking about, none. There were no other banana boxes.

*Anthony Nicotro, for Defendant, Cross*

Q. There were no other banana boxes. Well, let's see now.

What would you call a cluster, a box number S.F. 22? Do you know what that is? A. A cluster box was the Sula box.

Q. It was the Sula box. (268) A. Sula.

Q. And how high would you say they were? A. Nine and a quarter inches.

Q. Are you sure now? A. Yes.

Q. If I told you they were nine and five-eighths, would you say you might have been wrong? A. Nine and a quarter.

Q. Nine and a quarter, you say. All right. Where did these cluster boxes come from? A. Sir?

Q. What did they come from, what country? A. Honduras.

Mr. Bushlow: I would like this marked for identification.

The Court: One sheet is marked for identification as Plaintiff's Exhibit 5.

(Whereupon a sheet of paper is marked Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Bushlow) I ask you to look at this and identify it for me. A. Yes.

Q. Well, what is it? A. It is a box of measurements.

Q. What is the measurements of the cluster box (269) before that?

Mr. Sergi: Wait a minute, wait a minute, what are these?

Q. (By Mr. Bushlow) Are these the box measurements of Standard Fruit? A. I don't know, I never seen this form.

Q. Never saw that one? A. No, not this one.

*Anthony Nicotro, for Defendant, Cross*

Q. All right. Which one did you see? A. Something I have in my office, but this is not the one I have.

Mr. Bushlow: All right. I would like this marked for identification.

The Clerk: One page marked as Plaintiff's Exhibit 6.

(Whereupon a sheet of paper is received and marked Plaintiff's Exhibit No. 6 for identification.)

Q. (By Mr. Bushlow) I ask you to look at this and identify this form. A. Right.

Q. What is it? A. This is a box measurement.

Q. Whose box measurement? A. Standard Fruit.

Q. Will you read the measurements for me.

(270) Mr. Sergi: Wait a minute, wait a minute.

Mr. Bushlow: I want to introduce it into evidence, your Honor.

Mr. Sergi: He doesn't read anything unless it's in evidence. I would like to see it. We can do this this is a 1972 current standard size box as we understand the boxes have changed, that's the other box used in 1970.

Mr. Bushlow: Let me ask it.

Mr. Sergi: I object.

Q. (By Mr. Bushlow) Mr. Nicotro, how many size boxes are there today?

Mr. Sergi: I object, we are concerned—

The Court: Overruled in light of your statement in front of the jury.

Q. (By Mr. Bushlow) How many boxes are there today? A. Of bananas?

Q. Yes. A. One size.

Q. How many size boxes of bananas were there in January, January 15, 1970? A. Two sizes.

*Anthony Nicotro, for Defendant, Cross*

Q. And today there is only one size of bananas; is that right? A. One size.

(271) Q. Is there jumbo boxes? A. Jumbos are pineapples.

Q. All right. How about coconuts?

Mr. Sergi: I object, your Honor, we are talking about boxes of bananas, not pineapples or coconuts.

The Court: Overruled. Is there a coconut box?

The Witness: Yes, there is a coconut box, yes.

Q. (By Mr. Bushlow) How high is that?

Mr. Sergi: Object.

A. I don't know the approximate measurements.

Mr. Bushlow: I offer this in evidence first, your Honor.

Mr. Sergi: Object.

The Court: Ask him whether these are the same measurements of boxes that were in effect in 1970. They say this is dated some time in '72.

Mr. Bushlow: It is, your Honor.

The Court: Ask him whether the same measurements containing—

Q. (By Mr. Bushlow) Were these the same measurements that were in effect in 1970, the old measurements?

A. Approximately, yes.

(272) Mr. Bushlow: All right, now I offer it into evidence.

The Court: The old measurements?

Mr. Sergi: He has two.

The Court: Exhibit 6 we are talking about. Exhibit 6, old measurements.

Mr. Sergi: No objection.

The Court: To be received.

*Anthony Nicotro, for Defendant, Cross*

The Clerk: Plaintiff's Exhibit 6 is received in evidence.

(Whereupon a sheet of paper previously received and marked for identification is received and marked Plaintiff's Exhibit No. 6 in evidence.)

Mr. Bushlow: You want to see it, your Honor?

The Court: No, you go ahead and question him.

Q. (By Mr. Bushlow) Now, under the old—what kind of boxes do they refer to? A. They refer to banana boxes.

Q. Would you please read me the old measurements of the banana boxes? A. Yes, sir. "1915, 6-10's by 13"—I can't read it.

Q. It's 13,000. So the height of the old banana box was at least 13 inches; is that right?

Mr. Sergi: Wait a minute, just a minute, that's (273) the width.

Mr. Bushlow: No, it's not the width.

Mr. Sergi: I would like to see it again.

The Court: Wait a minute. You are not to interrupt.

The Witness: This is not clear anyway.

Q. (By Mr. Bushlow) What is the length of the box, let's see if I can do it that way. A. I don't remember the length of the box.

Q. It's right there, read it off there. A. 19 and five six tenths.

Q. Right now, what's the width of the box? A. Well, there is another number here, I can't read it.

Q. What is the width of the box, if you can read it. A. This one says 13, 13, it doesn't make sense to me.

Q. What is the height of the box? A. 12 and an eighth.

Q. 12 and an eighth? A. According to this.

Q. That's the old measurement, sir, is that right? A. That's what this says here.

*Anthony Nicotro, for Defendant, Cross*

(274) Q. Is that on your stationery, Standard Fruit?  
A. This is our stationery.

Q. Was that an interoffice memo sent around the office?  
A. Yes.

Q. So it wasn't nine and a quarter was it? The highest banana box? A. May I—

Q. Just answer yes or no. A. It's a different box, completely.

Q. But that was one of the boxes that was used in 1970; wasn't it? A. These are pineapple boxes.

Q. Now, they are pineapple boxes? A. These are pine-apple.

Mr. Sergi: Your Honor—your objection is overruled. You say these are pineapples.

The Witness: All listed under pineapple, jumbo boxes, they give you the other boxes there, pineapple boxes.

Q. (By Mr. Bushlow) They are not— A. This is your banana box up here, sir, this is the banana box on the top.

This refers to the pineapples, it doesn't say the word pineapples, but it's headed jumbos.

(275) Q. It doesn't say the word pineapple; is that right?  
A. No.

Q. Let me ask you something here. In answer to Mr. Sergi's question, you said that the height of the Sula box was nine and a quarter? A. Correct, sir.

Q. And the height of the Dole box or the regular box was eight and a half? A. Yes.

Q. What was the length of the Dole box? A. Between four and three-quarters?

Q. I'm not—don't ask me, I am asking you. A. I'm not quite sure.

Q. Not quite sure. What was the width of the Dole box or Cabana box? A. Fifteen, fifteen, something, sir.

*Anthony Nicotro, for Defendant, Cross*

Q. You are not sure? A. Not sure of that size.

Q. What was the length of the Sula boxes? A. Between 20 and three-quarters approximately.

Q. And what was the width of the Sula box? A. 11 and a half.

Q. 11 and a half? A. Approximately.

(276) Q. But you are sure it's not approximately, that they were eight and a half inches high and nine and a quarter inches, that you are sure of; is that right? A. This I am perfectly sure of.

Q. Did you measure it this morning? A. No.

Q. Did you speak to Mr. Sergi before you got on the stand? A. No, I did not.

Q. Did you know he was going to ask you about the height of these boxes? A. No.

Q. You knew nothing at all, he never showed you before you came here. Did he speak to you? A. Yes, he spoke.

Q. When did he speak to you? A. I spoke to Mr. Sergi last week.

Q. When last week? A. Over the telephone.

Q. When? A. Last week, last week.

Q. Last week. Do you remember the day? A. Thursday, I believe, or Wednesday, Wednesday.

Q. It was Wednesday? A. Yes.

(277) Q. And did you speak to him about the size of these boxes? A. Yes.

Q. So did he ask you the width of the boxes, the length of the boxes? A. We spoke about the size boxes, yes.

Q. But the only thing that you remember now, perfectly, is that they were eight and a half inches high, not approximately, and nine and a quarter inches, you are not sure of the length or the width? A. No, I'm not sure of the length or the width.

Q. Is that all you spoke about? A. That's right.

Q. That's all you spoke about, the size of the boxes? A. That's right.

*Anthony Nicotro, for Defendant, Cross*

Q. Did you say anything else to Mr. Sergi? A. No.

Q. Did he say anything to you? A. No.

Q. Did you get a subpoena to come to Court today?

A. No, I did not.

Q. How did you know to? A. I was told to come.

Q. By whom? (278) A. Mr. Sergi.

Q. When did he tell you to come to Court? A. This morning.

Friday, I'm sorry, Friday.

Q. When? A. Friday, I was told.

Q. Friday. Who did you speak to Friday? A. I spoke to a Mr. Riler (phonetic).

Q. Now, you spoke to him on Wednesday, Thursday and Friday? A. Correct.

Q. You spoke to him twice, not once, over the telephone. You never spoke to him this morning, did you? A. Sure I spoke to him.

Q. You spoke to him about the size of the boxes? Did you speak about the size of the boxes? A. Yes, yes.

Q. And did you tell him again, it was eight and a half inches and nine and a quarter? A. Correct.

Q. But you didn't tell him the length or the width, you didn't know it? A. I wasn't quite sure of that.

Q. But you were sure of the height? A. That's right.

\* \* \*

(287) The Court: The jury heard the testimony and the jury will make their determination as to the credibility of witnesses and weight to be given to various testimony.

Q. (By Mr. Bushlow) Mr. Nicotro, in Bay Ridge you began to be employed by them around December 1st or 2nd of 1969; isn't that right? A. Approximately.

Q. And by January 15th, when this accident happened, they had been only on the job approximately six weeks; is that right? A. Right.

*Anthony Nicotro, for Defendant, Cross*

Q. And these conveyors that you gave to them were the same conveyors that you had used for approximately 15 years before? A. That is correct.

Q. Were you present or employed by your company when they purchased these conveyors? A. No, I was not.

Q. And do you know, sir, whether these conveyors were new, come with the rails or without the rails? A. Well, I would have to go into quite a detail to explain that.

Q. Do you know, yes or no? A. No, I don't know.

Q. Do you know, sir, that these rails were— (288) are put on by the maintenance department, made originally when they were bought?

Do you know that, sir? A. They were not put on.

Q. Do you know that they are repaired by the maintenance department if the rail becomes loose, broken or bent? A. Yes.

Q. Do you know, sir, that as these conveyors are let down into the hole of the ship, that they hit the coping, the steel part of the ship and the rails get bent? Do you know that, sir? A. Yes.

Q. And that when these rails are bent that the maintenance department, the electricians, the maintenance department would cut out a section of the rail, put a new one in?

Mr. Sergi: Your Honor, I object. Which maintenance department is he talking of?

Q. (By Mr. Bushlow) Bay Ridge. Maintenance Department of Bay Ridge; is that right? A. Yes.

Q. I would ask you to take a look at—you are so adept with rulers. Take a look at defense exhibit AA, photograph number—may I have—

(289) Mr. Bushlow: May I have a moment, your Honor. Your Honor, will Mr. Sergi concede this

*Anthony Nicotro, for Defendant, Cross*

is a photograph taken at the same time, same place, by the same photographer as—

Mr. Sergi: Yes.

Mr. Bushlow: —as Defense Exhibit AA?

The Court: 8A—what about the other two, gentlemen, they are still in this case.

Mr. Hart: We concede.

Mr. Cichanowicz: Yes.

Mr. Bushlow: May I mark it for identification, please.

The Clerk: Photograph marked for identification as Plaintiff's Exhibit 8.

(Whereupon a photograph is received and marked Plaintiff's Exhibit No. 8 for identification.)

Q. (By Mr. Bushlow) I ask you, sir, to take a look at this photograph, Plaintiff's Exhibit 8 and tell me what it represents.

Mr. Sergi: Your Honor, I think the photograph speaks for itself.

The Court: Do you know what it represents?

The Witness: A conveyor.

Q. (By Mr. Bushlow) What is the measurements—

Mr. Bushlow: It speaks for itself, it shows (290) the dimensions, the exhibit speaks for itself.

The Court: He's entitled to ask him these questions on cross-examination.

The Witness: The measurement, seven inches.

Q. (By Mr. Bushlow) The width? A. The width?

Q. Of what the conveyor or the rail is. A. The conveyor from end to end, one part of the conveyor to the other.

Q. What is the part right here. A. That is the belt. That's the belt.

The Court: Seven inches is the width of the conveyor?

The Witness: Of the conveyor.

*Anthony Nicotro, for Defendant, Cross*

Mr. Bushlow: Mr. Sergi, would you concede this is a measurement of the rail?

Mr. Sergi: Yes.

Mr. Bushlow: As the measurements of the rail?

Mr. Sergi: Your Honor, the exhibit speaks for itself. Why have this witness tell us what it means.

The Court: He said it was the measurements of the conveyor.

The Witness: Now, I can see it.

Q. (By Mr. Bushlow) Now you can see it, is that right, sir, how much does it measure? (291) A. The measurement of the rail, you got it down here, six and an eighth.

Q. Is that rail folded down or is that rail folded up? A. It looks like it's in a down position.

Q. Thank you. Now, when that conveyor—is the rail down or is the rail up? A. Up.

Q. And when the rail is up, sir, from the conveyor to the top of the rail, how many inches would that be? A. It looks like six inches.

Q. Now, that's a rail that is welded on the side of the conveyor; isn't that right, and works on a hinge when they can close it up? A. Yes.

Q. Now I show you—where is that small picture, Plaintiff's Exhibit No. 4. And as you have testified, that is the conveyor that goes from A deck down to the B deck. Is there a rail on that conveyor? A. Yes, there is.

Q. Is that rail welded directly onto the conveyor without a hinge? A. Yes.

Q. That can't fold in and out? A. No. it cannot fold. (292) Q. That conveyor, when that's let down into the hole will bounce up again, coming—sometimes it gets bent?

Mr. Sergi: Object, your Honor, there is no testimony to that, I object.

Mr. Bushlow: Well, I am asking him.

*Anthony Nicotro, for Defendant, Cross*

The Court: He's entitled to cross-examination.

Mr. Sergi: He doesn't work on the ship.

The Court: If he doesn't know, he says so.

Q. (By Mr. Bushlow) Is that right? A. It could happen.

Q. And when that does happen, then the maintenance men of Bay Ridge will cut out a section of that rail, weld another section on; is that right? You know that Mr. Nicotro, come on now.

Mr. Sergi: If he doesn't know, he doesn't know. Give him a chance to answer.

Mr. Bushlow: He says it could happen.

Mr. Sergi: Don't argue with him, let him answer.

Q. (By Mr. Bushlow) How long have you been with this company? A. Since 1961.

Q. You worked with this company before? A. Once, then I left.

(293) Q. How long were you with them before you left? A. 1952 to '58.

Q. Six years; is that right? A. Correct.

The Court: All right, now—wait a minute. We are going to suspend here. The jury is going to have some lunch.

While you are out to lunch, I hope it doesn't snow. Don't discuss the case, we will see you this afternoon at about—well, I hope to get back by 2:15, if I'm not quite here, just forgive me. I have got a couple of cases to handle. I may be a little late getting off myself, but I will try to be back by 2:15.

(Whereupon the jury leaves the courtroom at 1:00 P. M.)

(Whereupon a luncheon recess was taken.)

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*Paul J. Keeler, for Defendant, Direct*

(3) PAUL J. KEELER, having been first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Sergi:*

Q. What is your occupation, Mr. Keeler? A. I am a Marine Consultant.

Q. Explain to this jury what a Marine Consultant does. A. Well, I have a company that performs operational services for steamship companies, stevedoring companies, cities, ports overseas and such things as that.

Q. Will you give us some of your background, your training exposure in the field of marine surveying. A. I started to sea as an ordinary seaman in 1931; I rose in grade to become a cadet deck officer and the steamship company I worked for had a contest at sea to bring one man ashore for executive training. I won that contest out of the fleet and I came ashore.

When I came ashore, I worked as a longshoreman, a winch driver, a hatch boss, a checker, a clerk and assistant stevedore, stevedore assistant, stevedore superintendent and a pier superintendent. Then, I was made traveling stevedore supervisor for the East Coast of Canada and East Coast of the United States.

I resigned this job in April of 45 to go with the (4) John W. McGrath Corporation, which at that time was the largest stevedoring company in the world as a Marine Superintendent in charge of their New York operations.

In October of 1953, I was elected Vice President of Operations of McGrath and their wholly-owned subsidiary, Atlantic and Gulf, which did stevedoring from St. John's, New Brunswick, in Canada, to Brownsville, Texas. I resigned this job in October of 1954, to open my own firm as a Marine Consultant.

After seven years of running that firm and after two years service as President of the American Steamship Line, I went to San Francisco as Assistant of Terminal and Cargo Activities around the world for that company. I resigned that job three years later on Decem-

*Paul J. Keeler, for Defendant, Direct*

ber 31 and returned to New York to resume my consulting business and I have been a consultant ever since.

Q. Would you tell us what experience if any you've had with conveyors, Mr. Keeler. A. The first steamship company I told you about was United Steamship Company. They carry bananas northbound, in fact, they were the biggest banana company in the world. We carry bananas northbound and freight southbound. When I came ashore and I originally went down the hold and worked with the men, then I became a foreman.

(5) The Court: Mr. Keeler, I am sorry I'm going to have to interrupt you. I probably shouldn't have let you get started but I thought the jury would be interested in your qualifications. Unfortunately, I have a sentence panel at 4:30 and that's part of our miscellaneous duties.

So, I'm going to adjourn now and I have one other matter here. Before that I want to have a brief discussion with the attorneys. We'll resume tomorrow morning at 10 o'clock. Be here as promptly as possible and don't discuss the case in the meanwhile.

I am sorry you'll have to come back, Mr. Keeler, but I guess you're used to that.

(The jury was excused at 4:14 p.m.)

The Court: Gentlemen, are you going to take the position that the guaranteed annual income must be admissible here in light of the cases which seem to say what I have read of them. You're a lot more familiar with them than I am. Seemed to say, if it's a condition of employment it should be excluded.

Mr. Bushlow: I didn't hear that, your Honor.

The Court: With two diametrically opposed positions, with respect to the income at the outset of the trial and my quick look because I haven't had

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*Paul J. Keeler, for Defendant, Direct*

(363) The Court: Are you ready, gentlemen? I'm the only one that's holding you up.

Mr. Hart: Yes, sir.

The Court: Bring in the jury. I have a Naturalization at 11 o'clock or shortly thereafter. I may have to run down for about 15, 20 minutes and swear in a class of immigrants. If I disappear that's why I have gone.

(The jury enters the courtroom at 10:27.)

The Court: Ladies and gentlemen, I'm sorry to keep you waiting, I had an Order to Show Cause to hear. And sometime after 11 o'clock I'm going to have to take about 15 minutes to go downstairs and swear in a naturalization class. We have about 250 new immigrants every week that are sworn in every week here during the course of the year. It's really quite an interesting thing but that's just part of my duties as Miscellaneous Judge.

I guess we had Mr. Keeler on the stand.

PAUL J. KEELER, having been previously duly sworn, resumed the stand and testified further as follows:

*Direct Examination by Mr. Sergi: (Continued)*

Q. Mr. Keeler, we recessed yesterday at the point where you were going to give us your qualifications of (364) your experience with conveyors. Will you please continue from that point. A. The United Fruit Company carried bananas, freight northbound and—the United Fruit Company carried bananas South. We had three ships of bananas, all handled on conveyors.

I worked on that job off and on for six years. When I went to the McGrath Corporation, we did Standard Fruit's work. We did the stevedoring for Standard Fruit for five years and we operated with conveyors.

*Paul J. Keeler, for Plaintiff, Direct*

During the war, I was in charge of the frozen beef that went to the American Expeditionary Forces in Europe. Having had beef experience and I must have loaded a million packages of meat cartons. In early winter season in the United Fruit season and before Castro and Cuba, we brought all the early Cuban vegetables to New York for the five years that I was working in the United Fruit Company. And the tomatoes, cucumbers and some of the other vegetables were all in cartons and we had a full top deck of the earlier arriving ship that arrived Sunday night and we stripped the deck off of the cartons of vegetables on Sunday night and then, started the bananas on the 3 deck on Monday morning. So, I had a lot of carton experience.

Mr. Bushlow: If your Honor please, I move the answer be stricken as not being responsive. He was asked (365) what experience he had with conveyors and he was very, very eloquent in telling us what experience he had with meat and tomatoes and other stuff, but I didn't hear the word "conveyor" ever mentioned once.

The Court: He finished up his answer by saying after he'd gotten rid of the vegetables, what have you, from the 3, the blue deck with bananas using the conveyors.

The Witness: Yes.

Mr. Bushlow: Sorry, your Honor.

Q. (By Mr. Sergi) Did you have to use conveyors in the discharge of the cargo of bananas? A. Yes.

Q. And any other fruits? A. Yes. Pineapple, bananas, I was a consultant for the Grace Line for off and on for three years on the West Coast of South America, melons and onions.

Mr. Bushlow: If your Honor please.

*Paul J. Keeler, for Defendant, Direct*

The Court: Do you use conveyors?

The Witness: Yes, out of the top deck. In the Grace Line we used conveyors out of the top deck and second deck down.

Q. (By Mr. Sergi) In all of those?

Mr. Bushlow: Just a moment, Mr. Sergi. If (366) your Honor please, the witness has given us three years. Would he please give us the dates from when to when that he's performed those?

Mr. Sergi: I think the objection is innocuous and he can cross examine all he wants to. I don't have to do that.

The Court: Sure, he can. Go ahead.

Q. (By Mr. Sergi) On all of these commodities you are talking about, were conveyors utilized in order to discharge all those commodities? A. Yes. Now, not the full ship. Like on the metal ships, we loaded with conveyors into the top deck of the United Fruit Company ships, which in the beginning of the war they were pressed into the service because they were the only reefer ships available and we loaded those ships on the top deck and deck below as much as we had to with conveyors and we hoisted the two lower decks.

Q. I ask you to look at Defendant's Exhibit AA-1, 2, 3, 4. I ask you to look at the photographs, Mr. Keeler. Were you familiar with those type of conveyors? A. Yes.

Q. Yes? A. Yes.

Q. Are those the conveyors you have been talking about? (367) A. Well, we had two types. We had this type that had a flat treadway on it and then we had conveyors that were curved with no sides on them. They just had rollers on the sides.

Q. They had a trough in the center? A. A flat trough.

Q. Used for what? A. Flat, but the conveyor belt on the side, rollers kept it in that shape.

*Paul J. Keeler, for Defendant, Direct*

Q. Without sides? A. Yes.

Q. What were they used to discharge? A. Well, we put cartons on them but they were principally used for bananas when we had them in stalks. We had to hold stalks before they cut the hands off and packed the hands in cartons.

Q. Did you use the same conveyors after the bananas were cartoned? A. Yes.

Q. Same conveyors without the sides? A. Yes.

Q. And are you familiar with the conveyors that are demonstrated in the photographs? A. Yes.

Q. And are they pretty standard conveyors as (368) reflected in the photographs? A. Yes.

Q. Did you have any dealings with those particular conveyors? A. Well, those were Standard Fruits, but our flat conveyors had no sides on them.

Q. Your flat conveyors had no sides on them? A. Those are McGrath, no.

The Court: Those are McGrath's?

The Witness: No. This is when I was working for the United Fruit Company.

The Court: United Fruit had no sides?

The Witness: I was a chewer for the United Fruit for 13 years.

The Court: When you say "are" I want to know who you are referring to.

Q. (By Mr. Sergi) When you were using those conveyors without any sides, were they with the trough or without the trough? A. Did they without?

Q. You said, you used conveyors without sides. A. Yes.

Q. Now, were those conveyors, was the trough in the center or flat? A. None of the trough conveyors had sides. None (369) of them, the front conveyors, we didn't have sides on but they were two different kinds of conveyors.

*Paul J. Keeler, for Defendant, Direct*

Q. Were they flat belts? A. Yes.

Q. Like are in the photograph? A. Exactly.

Q. But you used no sides? A. No.

Q. And what size cartons were discharged during the time you were working? A. Well, practically every size because when we finished discharging most of those ships, we left the conveyor in the side port for the top deck. And when the ship was finished, the conveyor and—had rollers on it whereas the different levels of tide came on the vessel the conveyor would simply roll in the dock and be pulled out again. We could leave it there when we started freight and we had our doors on the dock of outgoing freight segregated. The heavy stuff, the pipe, the lumber, had to be lifted but put in the ship by the gear. All the doors of general cargo had every conceivable type of cartons in there, heavy cartons, light cartons with floating furniture, everything else. We started those in the top deck to supplement and get the big hatches topped off. So that the big hatches would equal the smaller hatches and we started to load on those very same conveyors.

(370) Mr. Bushlow: If your Honor pleases, when he says "we", is he referring now to United or to McGrath?

The Court: I'm not clear. I don't think that answer is responsive.

Mr. Bushlow: I don't think so either. I ask it to be stricken.

The Witness: Repeat the—

The Court: I'll strike it out. Repeat the question.

(The question is read back as requested.)

A. All sizes.

Mr. Bushlow: For when?

Mr. Sergi: I'm asking the questions, please.

*Paul J. Keeler, for Defendant, Direct*

The Court: "All sizes"? They used "all sizes."

Q. (By Mr. Sergi) When you talk about "all sizes," Mr. Keeler, you were working for various companies; is that right?

Would you tell us, for the benefit of Mr. Bushlow, the name of the companies you were working for when you were discharging "all sizes" of cartons on conveyors without sides?

Mr. Bushlow: I object to that, your Honor. It's not for my benefit, it's for the benefit and justice of—

(371) Mr. Sergi: Stop interrupting.

Mr. Bushlow: If you would make your questions clear, Mr. Sergi, I wouldn't have to—

A. I was working on conveyors handling cartons of all sizes in the United Fruit Company, both loading and discharging from 1933 to 1938. I worked for Standard Fruit after I went to McGrath using conveyors not so much loading. They had very little cargo southbound, but in-bound it was completely conveyor operation. That was for five years and from about after the war, 1948 to about 1953, I worked for the Grace Line on conveyors from 1954, and '55 and then, I jumped the year 1957.

Q. (By Mr. Sergi) Now, since you state that they were discharging cartons, various sizes, would you give us the maximum height of any of the boxes that had been discharged during any one of those operations you just described? A. Well, especially when we were discharging the boxes, would be anywhere from a foot high to two feet high. When we were loading, the boxes were up as high as three and four feet on the flat belts not the curved belts.

Q. On the flat belts that you say you were discharging cartons, height of one and two feet? A. Yes.

*Paul J. Keeler, for Defendant, Direct*

Q. Were there any sides on those conveyors that (372) were used to discharge those boxes? A. No, there were no sides.

Q. No sides? Now, can you describe the manner in which the cargo such as carton bananas is removed from the lower decks of a vessel to a port door on a deck? Would you describe that to the jury, please.

Mr. Bushlow: If your Honor please, is he going to describe it as it's done now or as it was done two years ago or as it was done in 1957? The last time he said he worked on a banana ship—

The Court: I think it's a reasonable objection. If you ask, direct his attention to January of 1970.

Q. (By Mr. Sergi) Are you familiar with the manner in which carton bananas were discharged by conveyors from the lower recesses of vessels that carried carton bananas as of January of 1970? A. Yes.

Q. Were you familiar with it then? A. Yes.

Q. And is that procedure the same today as it was back in January of 1970? A. It is the same with Standard Fruit and it's different with United Fruit.

Q. Let's stay with Standard Fruit. Are you (373) familiar with the method in which Standard Fruit— A. Yes.

Q. —discharges its bananas? Are you familiar with the stevedore that works for Standard Fruit that discharges cartons of bananas? A. Mostly my men.

Q. Pardon? A. They were mostly my men.

Q. Were you familiar or weren't you familiar? A. Yes, I was.

Q. Thank you. Now, will you describe for this jury the manner in which carton bananas were removed from the lower recesses of vessels? A. A belt of a certain length, well first I should explain that any hatch in a

*Paul J. Keeler, for Defendant, Direct*

vessel which is a segment of the inner cargo capacity of a vessel a reefer vessel, usually has four—

Q. Will you tell us what you're talking about; what is a reefer vessel? A. A vessel that can either take chilled cargo or frozen cargo. Some vessels are made without the capacity of getting down to frozen and they just carry chilled or other vessels can only carry frozen and other vessels are adapted to carry either chilled or frozen. Of course, the dividing temperatures are 32 degrees. The frozen cargo (374) usually is carried 5 degrees below zero. The chilled cargo, bananas, are at 52, melons they try to get melons down to about 42 and each—each cargo compartment has to have a certain carrying temperature to inhibit the gases from ripening the fruit. If one melon gets ripe, the gases from it will start to ripen the melons all around it in the carton.

So, a reefer vessel has many decks so that you have an option for using the different compartments. You can put melons in this deck and you can put bananas in that deck and some other commodity that has to have a different temperature and each deck is controlled. You can control it at any temperature that you want.

Q. Will you continue telling us how you discharge? A. For that reason, you have the lower port deck, is the lower hole. The deck above is the orlop deck. The deck above that is the lower between deck and the deck above that is the upper between deck. Then, you come out on the main deck and weather deck; that has the hatches on it.

Now, some people name their decks like Standard Fruit does, Standard names them A, B, C and D, going down.

Q. How would you discharge the carton bananas from the lower deck?

Mr. Bushlow: If your Honor please, is this his opinion as how they should be discharged or is this how they are discharged?

*Paul J. Keeler, for Defendant, Direct*

(375) The Court: As I understand—

Mr. Bushlow: I'm lost.

The Court: I'm not lost. As I understand it, this is how this was the general practice by Standard Fruit in January of 1970; isn't that correct, Mr. Keeler?

Q. (By Mr. Sergi) Are you familiar with the general practice in the manner in which Standard Fruit Stevedores discharged their carton bananas from the inner recesses of vessels back in January of 1970; yes or no?

A. Yes.

Q. Will you please describe that? A. A belt of the proper length to make, to reach from the floor of one deck to the lip of the hatch coming off the next deck and every deck has to have an opening in it that you can lower the cargo through and pull it out. It's a rectangular opening, that's got covers on the main deck and that is called the square of the hatch.

All of the deck that's underneath it are the wings; breast, then you have the forward wing, and aft wing and which corresponds to, if the lighted area was the hatch square and that was the aft under the ship that would be the after ship under that partition, that part of the ceiling.

But a belt of the proper length is put in so that it touches on the deck on a box to relieve the men who are (376) putting the cases: all the way down to the deck level. They put a rigid box under the end of the belt to bring the end of the belt up somewhere around their belt so it makes it easier to handle or, if the fellows carrying them on their shoulders or coming on gravity conveyors so they can handle them, the belt is generally that high off the dock.

The belt then goes up and it rests on the edge of the next deck. It extends up again to belt high, same height so it can be easy for handling if you're standing alongside of the belt. Then, gravity rollers take it around

*Paul J. Keeler, for Defendant, Direct*

in a circle or half-circle, a hundred and eighty degrees.

They put them on another belt that goes up to the next deck and that's just continued like a flight of stairs until they get up to the top deck. Then, they're sent through a side port and a longer conveyor takes them out to the dock where they're put on the trucks if they're coming in-shore or car flows on the off-shore side of the ship.

Q. Now, how many men are—withdrawn.

After the upper decks are discharged and they're now discharging the lower deck, are any men left remaining on the upper decks that had already been discharged?

A. The men at the transfer point once you finish off the top deck, then you finish off the upper between deck and say you're just in the C and D deck or the lower hole and the men on the two upper decks are just at the transfer point (377) where the machine comes up and joins the rollers. Then, they must make sure that if there's a halt in some operation above them where the boxes go out and no trucks are on the dock, one of the top belts broken down or somebody run over the electrical wire or any of a million things, the other men at those transfer points have a little piece of wood and in it there is a hinge section in the middle of the wood as big—about as big as the sole of your foot.

It's secured, so when a man stands flat on the piece of wood that little hinge goes flat with the other wood and turns the belt on. So all he has to do while he's using his hand to straighten up the belt or whatever, he has to do with his hand, he lifts up one foot and the machine stops. When he's ready to go again, he simply puts his hand to straighten up the belt or whatever, he has work.

Mr. Bushlow: If your Honor please, how many men remain on the deck? I still didn't get an answer?

The Court: I'm striking it all out, the question and the answer.

*Paul J. Keeler, for Defendant, Direct*

Q. (By Mr. Sergi) How many men are required? A. The men that remain on the—

Q. How many men are—

The Court: 1's a simple number, Mr. Keeler.

The Witness: Either be one or two men at each transfer point.

(378) Q. (By Mr. Sergi) Now, the explanation that you gave before was that explanation pertaining to what the man at the power step does. A. What I was trying to explain,—

Q. Just answer my question, will you please, Mr. Keeler? A. Yes.

Q. You just stated something that was stricken from the record. Was that your explanation what the man at the pedal has to do at each contour? A. Yes.

Mr. Sergi: May I move to have that answer—

The Court: No. We don't have to have it again. You can recall that answer to that limited purpose.

Mr. Sergi: Thank you.

Q. (By Mr. Sergi) Now, does the man that stands at the pedal completely control the movements of that belt or conveyor? A. Yes.

Q. There is no main switch where one switch stops all the belts? A. There is no switch, but there is a main feeder cable on the dock, a big cable. If you were to pull that out of the feeder box, of course, the whole thing would stop. But that's never done and that's never used as a control.

(379) Q. Now, how wide is the belt?

Mr. Bushlow: Which belt, your Honor?

Mr. Sergi: The belt we are talking about in the photograph.

The Court: Talking about the Standard Fruit belts used in January of 1970, how wide are—

*Paul J. Keeler, for Defendant, Direct*

Q. (By Mr. Sergi) I withdraw the last question. Are you familiar with the size of the belt in the conveyors used by Standard Fruit? A. Yes.

Q. Excuse me, yes or no? A. Yes.

Q. And are the belts that you're familiar with the same belts that were being used by Standard Fruit on January 15, 1970? A. Yes.

Q. Same belt today? A. Yes.

Q. Would you describe the width of that belt on the conveyor? A. Went to twenty-four inches.

Q. Now, when the belt is put in motion by the operator who steps on the pedal, what is the speed of the movement of the belt?

Mr. Bushlow: If your Honor please, on which (380 & 381) conveyor and when?

Mr. Sergi: We are talking about one conveyor. Do I have to be interrupted like this all the time?

The Court: Wait a minute. It is not wholly clear in my mind. There are at least four conveyors that go down and one of them is a particular type and another three are based—I think it's a legitimate objection talking about the conveyor usually used between A and B deck and talking about the conveyors used.

Q. (By Mr. Sergi) Are there different conveyors, Mr. Keeler? A. Yes.

Q. Are they different in size? A. Yes.

Q. Are they different in another way than size? A. Yes.

Q. Let me explain and ask the question, please.

Are the speed of the smaller conveyors different than the speed of the larger conveyors? A. No, they try to match that.

Q. All right. Now, and are the conveyors that are used in A and B deck and B and C deck and C and D

*Paul J. Keeler, for Defendant, Direct*

deck (382) different in size or length? A. Some of them are, yes.

Q. Now, keeping in mind the different sizes, is the movements of the belt the same speed or— A. Is the movements of the belt?

Q. The belt as it moves, its speed is the same on all of them? A. Yes, the speed is the same.

Q. Now, tell us what the speed is. A. Well, you get a motor with a gear head on it and—

The Court: Now wait a minute. How fast did the belt move?

Q. (By Mr. Sergi) How fast does it move? A. Well, I try—

The Court: How fast does it move? One mile an hour, two miles an hour?

The Witness: Your Honor, 3,000 boxes, so you can change the speed.

The Court: You mean it's variable.

The Witness: No. But you, each company is variable or—

The Court: Talking about Standard Fruit, January of 1970.

The Witness: Standard Fruit has geared up for (383) 3,000 boxes an hour off these belts.

Q. (By Mr. Sergi) What is the speed; I don't know what 3,000 boxes means nor does anybody else. What is the speed? A. Very slow.

Q. What is very slow? Move your arms, if you can and— A. Take 3,000 boxes an hour and they are approximately two feet long with the distance in between them and that would be 6,000 feet. You got 60 seconds, 60 seconds into this and you have 100 foot a minute, which is very, very slow.

Q. The pedal that starts and stops the movement of the belt, is it an accelerated type of pedal or just stop

*Paul J. Keeler, for Defendant, Direct*

and going? A. Stop and go, no variation.

Q. Are you familiar with the mechanism—withdrawn.

Are you familiar with the gear that makes the movements of the belt in those conveyors? A. Yes. You first—

Mr. Bushlow: He said, "Yes."

The Court: That's all you have to say.

Mr. Sergi: He's explaining—

The Court: Better ask him to describe it, (384) the gears.

Mr. Sergi: I can't hear.

The Court: You said, are you familiar with it.

Q. (By Mr. Sergi) I just said, please explain it.

The Court: All right, go ahead.

A. You first see the gear head motor, which is an electric motor and you can see the gear head very clearly in this picture right here. That is the gear head and the gear head first off, reduces the speed of the motor maybe ten to one. The armature of the motor is turning at a certain speed and where the gear head comes out, the shaft of the gear, it will be turning one-ten of that speed.

Then, you hook up another shaft and a sprocket chain just like a motorcycle chain. By putting a small sprocket on that and a larger sprocket on the head shaft of the belt, you again reduce it by some such figure, I just don't know exactly the speed of the motor. But you start with the motor and you gear the motor, turn the motor, turn the gears going slowly and the head pulley of the belt is the one, the treadway or the belt around and it turns very slowly. Although the motor is going very fast.

Q. Now, in the gear arrangements of the conveyor is there anything in that wherein where he, the operator

*Paul J. Keeler, for Defendant, Direct*

(385) pushes the pedal down, it can cause that belt to jerk? A. No.

Q. Or jump? A. The gearing prevents the jerking.

Q. There is no jumping at any time? A. No.

Q. You said that the movements of that belt is 100 feet a minute. Now that—I can't conceive that. Will you please take this piece and demonstrate across the top of this desk what you approximate the movement of that belt when it's carrying any cargo. Demonstrate to the jury approximately what the speed is. A. Going about like that (indicating).

Q. Thank you.

Mr. Bushlow: Your Honor, can we describe that for the record? He—

Mr. Sergi: He said 100 feet per minute. I don't know how else we're going to describe it.

Mr. Bushlow: The motion he made.

The Court: No. I think you better leave it where it is.

Q. (By Mr. Sergi) Now, is there a particular manner in which cartons or boxes are to be placed upon that conveyor in order to move it out of the hatch? A. Yes.

(386) Q. Would you then indicate or tell this jury the manner in which a box should be placed on that belt? A. The boxes are rectangular like this and if this was the tread of the belt going up to the deck, the boxes are all put on with the long axis of the boxes parallel with the long axis of the conveyor. They are never put on sideways.

Q. Why are they never put on sideways? A. Well, there are two reasons; for one reason, is they are more stable this way and you can't make them roll because you'd have to cartwheel or something to roll and you can't make a flat carton roll, it's impossible. The belt

*Paul J. Keeler, for Defendant, Direct*

will slip underneath it and secondly, it doesn't fit in between the rails or sides of a belt unless the belt is a very wide belt and then, a box that's misplaced slightly has a tendency to go up the belt like—(indicating) and straight out by the rail all the way up; there's just one standard way of doing it.

Q. You have a photograph there, Defendant AA, AA-4 and do you see in that photograph cartons being discharged on a conveyor? A. I didn't hear the end of that.

Q. You see cartons being discharged on the conveyor in that photograph? A. Yes.

Q. You see the men placing the cartons on the (387) conveyor? A. No.

Q. See the men placing the cartons on the conveyor? A. Well, I don't know whether he's placing it on the conveyor or just straightening it out.

Q. Do you see boxes on the conveyor? A. Yes.

Q. Now, are there boxes on that conveyor about to be placed on there, are there any boxes on that conveyor in the photograph that you say are improperly placed on the conveyor? A. If the one the man got his hands on—that one is improperly placed--

Mr. Sergi: May I show that to the jury? I'll just walk past, that's AA for Defendant Exhibit. The top box you say where the man has his hands on it is improperly placed.

When it's improperly placed like that, Mr. Keeler, what, if anything, happens?

A. When it gets up to the top the man who is running the belt at the head of the belt transferring that box to the rollers, he's just got to straighten it out.

Q. Does he have to stop the conveyor to straighten it out or just— (388) A. No. If he's a strong man paying attention to his job, he just fits them.

*Paul J. Keeler, for Defendant, Direct*

Q. Now, I am going to give you a hypothetical question, Mr. Keeler. Assume that a box had been placed on a conveyor at C deck by one of the longshoremen and I beg your pardon, withdrawn—

Assume, Mr. Keeler, that a carton of bananas had been placed on a conveyor at D deck by the longshoremen and that it had traveled from D deck up to C deck and from C deck to B deck and it's now traveling up from B deck to A deck and the operator of the conveyor at A deck, the one who places his foot on the pedal realizes that the box is not in its proper position.

And then, he straightens the box and he returns to his pedal, puts his foot on the pedal and then, starts the conveyor up and the box starts to tumble back striking another box and bounces off that box and down in the lower hold and strikes a worker down in D deck.

Assuming those facts to be true, do you have an opinion as to the manner—withdrawn.

Do you have an opinion as to the reason for the falling of that box from that conveyor?

Mr. Bushlow: If your Honor please, I object.

The Court: The objection is sustained.

Mr. Bushlow: Thank you.

(389) Q. (By Mr. Sergi) Assume further in that hypothetical question—

The Court: Your hypothetical question contains statements of fact which are incorrect. That's why Mr. Bushlow objects and that's why I sustained it.

So, you don't have to assume further, you'd better start again.

Q. (By Mr. Sergi) Assume, Mr. Keeler, the following: That a longshoreman standing at the top of the conveyor traveling from D to A deck, whose job it was to place down the boxes and start or stop the conveyor stated the following: That a box that had struck a longshoreman

*Paul J. Keeler, for Defendant, Direct*

in D deck was dropped from his conveyor and that it dropped because it was tumbling over and over and over and that he says, "It was caused to fall over because he started the belt and it jumped and after he started the conveyor it jumped and the boxes turned over backward and backward and rolled down the conveyor and it started tumbling down and hit the box behind it and it went over and the conveyor that he had stopped, had other boxes on the conveyor and nothing had fallen off the conveyor when he had stopped it. Nothing fell off the conveyor while it was working and the boxes that were coming up to A deck and those boxes were coming up, then something happened and he stopped the conveyor. Up to that point the boxes had not fallen off and then, the box fell off when he started the (390) machine and it started off quickly. And then, the boxes kept rolling down the conveyor and it didn't fall off because the sides were too small, it fell off because he started the machine and it rolled down and it hit another box and then fell off."

Now, can you assume all those facts to be true, sir? A. Yes.

Q. Now, with all those facts as I have read them to you, do you have an opinion as to what caused that box to fall off the conveyor; yes or no? A. No.

Q. Now, could the box have fallen off in your opinion? Could the pedal being depressed cause that machine to jerk or jump?

Mr. Bushlow: I object, your Honor. There is no such testimony in this case. It's pure speculation, pure supposition.

The Court: No. Wait, come up here, gentlemen.

(Side bar discussion held out of the hearing of the jury.)

*Paul J. Keeler, for Defendant, Direct*

The Court: The last question, could the machine when the pedal was lifted or depressed, jump or jerk? That's what Jackson testified.

Mr. Sergi: When he depressed it, not when he (391) lifted his foot.

The Court: When Jackson testified, he said that when he depressed his foot the machine jumped.

Mr. Bushlow: Same machine, I haven't got the testimony.

The Court: Yes.

Mr. Bushlow: But I'm sure he meant the box jerked, the machine doesn't jerk.

The Court: He said—

Mr. Bushlow: He said that.

Mr. Sergi: I'll accept what you say. The box jerked, not the machine.

The Court: Let's make sure. I have a selection of what he said.

Mr. Sergi: I thought it read out of here, your Honor, Page 47, "It jumps."

The Court: No, no. It was before that. He said it voluntarily on direct. He said—

Mr. Cichanowicz: "When I started running the belt, the belt automatically jumped. When the boxes went tumbling I took my foot off the belt right away and stopped the boxes from tumbling and it fell in the hole."

The Court: There is no question that was one of the questions he's entitled to ask him. Okay.

(392) Mr. Bushlow: Okay.

The Court: He's withdrawn it.

(The following proceedings are resumed within the hearing of the jury:)

Mr. Sergi: Can we have the last question, please?

*Paul J. Keeler, for Defendant, Direct*

Mr. Bushlow: I withdraw the objection, your Honor.

The Witness: No, the machine would not jerk and for that reason the boxes would not roll backward.

Q. (By Mr. Sergi) Now, if the carton riding up the conveyor from C deck, from D deck to A deck, and the man having stopped it, the operator of the machine is standing at A deck.

Mr. Bushlow: On what deck, the operator?

Q. (By Mr. Sergi) The operating is standing at A deck, operating the conveyor from A deck to B deck and stopped the machine and then adjusted one of the boxes, and then he restarted the machine and one of these boxes had fallen off. Do you have any opinion, Mr. Keeler, as to the reason for the box falling off the conveyor belt? A. Yes, I do.

Mr. Bushlow: I object to the question, your Honor. It's a hypothetical question, assumes facts.

(393) The Court: It assumes an incorrect fact. The operator at the A deck did not adjust the box according to the prior testimony. He says, as I recollect, that will be the juror's recollection as told. But it's my recollection for whatever it's worth, that it was the operator of the D deck that made such adjustment.

Mr. Sergi: Okay, I'll try again.

Q. (By Mr. Sergi) The operator of the conveyor standing at A deck, operating the conveyor A to B deck, stopped the machine and one of the longshoremen at B deck adjusted one of the boxes. And then, the operator at A deck restarted the conveyor and one of the boxes fell from the conveyor from A deck, from the conveyor that was going from B deck to A deck and the box fell off that conveyor and fell down into D deck.

*Paul J. Keeler, for Defendant, Direct*

Do you have an opinion as to the cause of the falling of that box from that conveyor?

Mr. Bushlow: If your Honor please, I object again. It assumes fact not in evidence. He says, one of the longshoremen on B deck and I think the evidence shows that there was only one longshoreman on B deck.

The Court: That's my recollection. It's the jury's recollection that controls. But with that (394) caveat and given that hypothetical, he is giving you so far, do you have an opinion as to what might have caused that box to fall; yes or no?

Q. (By Mr. Sergi) Do you have an opinion? A. Yes.

Q. Please give us the opinion. A. If provided the box was properly straightened up, it could have only been jammed up at the top of the belt to the roller with the fellow operating the box, operating the belt beyond that. That caused the boxes to jump up at the top of the conveyor and fall off.

Q. Could the restarting of the conveyor by the man standing at the pedal of A deck have caused that box to tumble backwards, strike another box and fall over; yes or no? A. I don't know how to answer it.

Q. If you can't answer it—

The Court: You want the question reread? Do you understand the question?

Q. (By Mr. Sergi) I withdraw the question.  
I see your problem, Mr. Keeler.

Assuming that there are no boxes in front of the box loading up to the top of the conveyor running from the B deck to A deck and the operator of the conveyor at A deck stepped on the pedal, could his restarting the conveyor cause (395) the box to topple backwards and strike another box and fall off? A. No.

*Paul J. Keeler, for Defendant, Direct*

Mr. Bushlow: If your Honor please, I object to the answer and the question. Again, assuming facts that are not in evidence; there is evidence that there were other boxes on the conveyor.

Mr. Sergi: In front of the one that fell off there is no testimony.

The Court: In front of the box there is no question that there were boxes behind the box in question.

Q. (By Mr. Sergi) Did the size of the sides, the side rails on the conveyor or the lack of the sides on the conveyor have anything to do with the falling of the box under the circumstances that I described? A. No.

Q. Assuming the box was twelve inches high in order to prevent a box from falling over the side, what would the size of the side rail have to be? A. Well, if the side rail were four inches or six inches or eight inches or twelve inches and it was up and somebody said a box fell over the side, there is no—there is no force in that operation to lift a box up in the air off the conveyor belt up either one end of it or the (396) other end. There is no force to move that box once it's put on a conveyor belt. There isn't an ounce pushing it to the left or pushing it to the right.

The only force on that box is the rotary belt running underneath the box. If the box is free to go, it takes the box with it. If the box is not free to go, because of a jam-up on top of the belt, the belt will generally run under the box and not push the box until it is free.

However, if the situation at the top of the belt is such as a box can come up and get off the end of the belt like this counterbalance and then go that way, another box coming up catches the back end of it and the second box will do this to the first box and then you have just—just got a pile-up.

*Paul J. Keeler, for Defendant, Direct*

They start to fall off the top of the machine. But the machine should be stopped before that happens and that's why he has a control there.

Mr. Bushlow: If your Honor please, I move it be stricken. The question was how high must the rails be in order for the boxes—

The Court: Read the question.

(Whereupon the question is read back.)

The Court: Strike the answer and disregard it, ladies and gentlemen.

Q. (By Mr. Sergi) You understand the question, (397) Mr. Keeler, please give us an answer. A. A box, one high on the conveyor cannot get by.

The Court: No. Mr. Keeler.

Q. (By Mr. Sergi) Let me withdraw the question.

Mr. Keeler, if we have a twelve-inch-high box or a nine-inch-high box and we have a four-inch side rail, you say the box won't fall over the side rail and has nothing to do with maintaining the box on the conveyor; is that what you said? A. Yes.

Q. Is that what you said? A. A properly placed box.

Q. Let's assume a hypothetical situation; we have a four—a twelve-inch-high box riding on a belt. A. Yes.

Q. And in order to keep it completely from falling off under any circumstances, how high a side rail would be needed? A. The side rails would have to go up to the sky.

Mr. Sergi: Thank you very much. I have no other questions.

Sorry, sorry, may I have a few more questions. I beg your pardon, Mr. Bushlow.

I just remembered something very important, I must ask it.

*Paul J. Keeler, for Defendant, Direct*

(398) Q. (By Mr. Sergi) Mr. Keeler, is there a custom, practice along the waterfront for longshoremen who work on cargo ships and also banana ships as to where they should stand during the discharge of cargo? Is there a custom or practice? A. Yes.

Q. Are you familiar with the custom and practice? A. Yes.

Q. Please tell us the custom and practice that you know —withdrawn.

And did that custom and practice exist January 15, 1970? A. Now where exactly, where in the operation?

The Court: It's a little broad. He's going to pinpoint each longshoreman and where he's going to be or—

Q. (By Mr. Sergi) Just generally, is there a custom and practice? If you can answer it, say so. Is there a custom and practice as to where a longshoreman should stand during the discharge of general cargo? Let's say, with general cargo.

Mr. Bushlow: I object, your Honor. There is no "general cargo."

The Court: I'll sustain as to that.

(399) Q. (By Mr. Sergi) Let's withdraw that. Let's say with bananas, okay? Let's say with bananas being discharged on conveyors, okay? And let's stay with cargo being discharged on conveyors and let's stay with cargo bananas being discharged on conveyors, and let's say about January 15, 1970, was there a custom and practice where longshoremen should stand when they are discharging that type of cargo in that particular manner? A. There is a custom.

The Court: Yes or no.

The Witness: There is a custom where certain men should stand.

*Paul J. Keeler, for Defendant, Direct*

The Court: All right.

The Witness: Others—

Q. (By Mr. Sergi) Did you say there was a custom and there is a custom? A. Yes.

Q. Now, will you please tell the Court and jury what the custom was?

The Court: As to those certain men.

Mr. Bushlow: Certain men. Let him identify the certain men.

The Court: He'll have to.

A. The certain men that I am naming are those men who have stationary positions and they are not walking (400) around. Had been like the cargo, those men have not set positions. But the stationary men who run the belts and guide the boxes, either are the belt or the gravity conveyor, they have a set position and that's the set position is, many times controlled by the situation that exists at the time.

Now, if you have two belts, say you have a belt coming up from a deck and one meeting it four square, everything is just right. This belt is an inch or two higher than the other one. One man on the one side of that connection point is plenty.

If it comes up just a little crooked, racks it one way, pulls it, take a right off everything is fine. You have another situation where because of the deck of the fruit or the gear that's available in that hatch, it just comes up and properly meets a gravity roller, either straight one or curved one, and there is a transfer that actually has been made by the men of each box from the belt to the roller, and then you need two men. You need one there on each side.

Mr. Bushlow: If your Honor please, I move the answer be stricken. He was asked whether there is a custom in usage and now he says it depends

*Paul J. Keeler, for Defendant, Direct*

on the situation. Is there a custom and usage or isn't there, or did it depend on the situation that existed.

The Court: Apparently, custom and usage depends (401) on the situation that exists. I think you put your finger on it. It depends on the custom and situation that exists.

Q. (By Mr. Sergi) Concentrating, Mr. Keeler, on the men that are moving about in handling cargo, indeed, and their placing up cartons placed on conveyors, is there a custom and practice as to where they should stand or not stand in a hatch? A. No. The height of the car and the position of the cargo and the particular lift that you want controls where they stand.

Q. Was there a custom and practice as to whether or not longshoremen should stand in the square of that hatch if cargo is being removed from the hatch, such as cartons of bananas being placed on conveyors that are going to higher levels; yes or no?

Mr. Bushlow: Objection, your Honor. It is a leading question.

A. No.

The Court: Was there a yes or no?

The Witness: No.

Q. (By Mr. Sergi) Yes or no? Is there a custom and practice? A. Yes.

Q. Now, will you please tell us what the custom (402) and practice was in 1970? A. No longshoremen should be in the square of the hatch when tonnage is liable to fall or being hoisted in or hoisted out.

Mr. Sergi: Thank you very much.

*Paul J. Keeler, for Defendant, Cross*

*Cross Examination by Mr. Bushlow:*

Q. Mr. Keeler, are there bananas in the square of the hatch? A. Yes.

Q. So, they have to be unloaded by the longshoremen? A. Yes.

Q. Do you have to put them on conveyors? A. Yes.

Q. Can they do it standing in the wings? A. Well—

Q. Can they do it standing in the—

Mr. Sergi: Objection, your Honor. Let him answer the question he's putting to him. He's fighting with him, objection.

The Court: Calm down a little bit. It's all right.

Mr. Sergi: I don't think it's proper cross (403) examination.

The Court: Mr. Keeler can take care of himself.

Q. (By Mr. Bushlow) Mr. Keeler, answer me yes or no. If there are bananas in the square of the hatch, the longshoremen got to pick those bananas up, don't they? A. Yes.

Q. He's in the square of the hatch when he picks those up? A. Yes.

Q. And the conveyors are running, aren't they? A. Yes.

Q. He's got to put it on a roller to get to the conveyors, doesn't he? A. On the ends of the conveyor.

Q. He's going to pick it up, walk to the end of the conveyor? A. Yes.

Q. But he's got to pick it up from the square, doesn't he? A. Well, yes, all right.

Q. Don't do me a favor, Mr. Keeler.

Mr. Sergi: Objection to the form of the question, he's arguing—

The Court: No, it's—

(404) Q. (By Mr. Bushlow) Does he have to pick it up from the square of the hatch? A. Yes.

*Paul J. Keeler, for Defendant, Cross*

Q. Are there bananas above him going up on the conveyor? A. Yes.

Q. Because he's got to stay there because that is where his work is? A. Yes.

Mr. Bushlow: Thank you.

Q. Mr. Keeler, you have gone through your qualifications and there was a time when you worked for United Fruit; is that right? A. Yes.

Q. Do you recognize this man here, Mr. Keeler? Sal, stand up. A. Yes.

Q. You worked with him, didn't you? A. I didn't work with him.

Q. Well, he worked under you? Where, what pier? A. I don't remember. He was on one of the east river piers.

Q. If I told you Pier 13? A. Which one?

Q. Pier 13, East River. (405) A. So many years.

Q. For McGrath, wasn't it? A. Yes.

Q. How long ago was that? A. He worked over there from about 1945 to 1954.

Q. Did you work there at that time?

Is that the time you worked for McGrath? A. Yes.

Q. He was there all the time? A. I don't know that he was there everyday, but I recognize him as being one of the East River men.

Q. And in 1954, are you sure you severed your connection with McGrath; is that right? A. Yes.

Q. Before that you worked for United Fruit? A. Yes.

Q. Bananas? A. What?

Q. On bananas? A. No, not particularly. I worked half bananas and half freight.

Q. Half bananas that you worked, did you use conveyors? A. Yes.

Q. What type of conveyors? (406) A. Well, off the top deck we used those flat conveyors, and then in the lower two decks we had machines that were a different type.

*Paul J. Keeler, for Defendant, Cross*

Q. What kind of machines did you have? A. Called them Davis Machines.

Q. What did they look like? A. It was a machine with a marine leg on it; that had pockets in it, and the men come over and dump the bananas they went up on their pocket.

Then, transferred to a belt on deck which took them out on the dock.

Q. That belt was on the top deck, wasn't it? The pockets emptied out because the deck from out the side port on to the deck; is that right? A. Yes. Most of the entrances in the summer.

Q. Was that right, sir? Isn't that the general way that United Fruit unloaded bananas when you were with them? A. In the winter, yes.

Q. It was like a dumbwaiter; went up in pockets and when he hit the top deck emptied out the conveyor that went out the side port? A. Only for the two lower decks. The lower hold and the oilup deck.

Q. You didn't have those conveyors running from D to C and from C to B and from B to A, did you? (407) A. No. We had them from B to—we had them from B to A and we had the pocket machine in the two lower decks.

Q. When you worked on bananas for United, those bananas came in stalks or steps; is that right? A. Well, we in the beginning, they were all steps, yes.

Q. And when did you start using boxes? A. They started to change just about 1953.

Q. 1953. A. United Fruit Company was experimenting with cartons for a long while. The ventilation of the carton, the method of packing, the handling of the carton, the weight, it all took many years to get the proper—

Q. Would I be correct in saying, Mr. Keeler, it was not until sometime around 1960, 1961 that they started cartons instead of stems? A. I would think so, in around there.

*Paul J. Keeler, for Defendant, Cross*

Q. So, in 1954, they were stems, right? Nothing to do with those cartons, isn't that right? A. They were stems not cartons in 1954? A. Well, in 1954, I had ships partially cartons, partially stems. But they were mostly stems. Had not been converted and they were still—you see, well, it's a market condition. Fellows who were set up to sell stems weren't set up to sell cartons and you couldn't make the transition quickly.

(408) Q. Mr. Keeler, when was the last time you were on a banana boat? A. Actually working?

Q. Yes, actually working on a banana boat. A. I was up in Albany. I was up in Albany in the springtime of last year with Frank Donum (phonetic) up in Port Commission. I saw one of the United Fruit Company ships working.

Q. I said, when were you actually working on it. Not when you saw, actually were working. A. The last time I worked?

Q. Yes. A. Physically or when I was—

Q. As supervisor, physically, that's part of your job. A. 1954.

Q. From 1954, you have not actively supervised or engaged in the unloading of a banana boat, have you? A. That is right.

Q. You said something very interesting before, sir, when Mr. Sergi asked you how do you put the boxes on to the conveyor. And you said, you put it on lengthwise, right? A. Yes.

Q. And the reason for that, if you put it on the other way, it's going to hit the rails; is that right? (409) A. Yes, it wouldn't fit.

Q. Wouldn't fit because there are rails on there. When, for the first time, did you ever see rails on these conveyors—withdrawn.

Didn't you testify that in your experience with conveyors there are no rails at all? A. Yes.

*Paul J. Keeler, for Defendant, Cross*

Q. Now, you testified that you must put the box on a certain way so it won't hit the rail; is that right? A. That is not the only reason.

Q. Is that the reason you gave? A. No, you just don't put a box on this way if you can put it on the other way.

Q. If you have—

Mr. Sergi: Objection, your Honor. Let him finish the answer.

Mr. Bushlow: I just want—

Mr. Sergi: Please—

The Court: Mr. Bushlow, let him finish his answer.

As I recall, he gave two reasons.

A. If you have rails, it is impossible to put the boxes on this way. You must put, if you don't have rails, you could put it either way.

Q. What's the purpose of the rails? (410) A. The rails are to keep a box that's improperly put on a conveyor from somehow or other increasing its position, it's bad position where until at some point, where it could fall off.

Q. That's it. As to prevent it from falling off? A. I presume so.

Q. So, therefore, the height of the rail if the rails are used to prevent the boxes from falling off, the height of the rails would be important, wouldn't it? A. No.

Q. Wouldn't be important? A. No.

Q. Take a look at plans, Defendant's Exhibits—

The Court: Mr. Bushlow, I am going to have to interrupt you, unfortunately. We will take our morning recess now. Ladies and gentlemen, for about ten minutes. Probably 10 to 15 minutes. Don't discuss the case.

(Whereupon a recess was taken.)

*Paul J. Keeler, for Defendant, Cross*

Thereupon DR. JOHN LOVERNE, having been first duly sworn, was examined and testified upon his oath as follows:

*Direct Examination by Mr. Hart:*

Q. Dr. Loverne,—may I be given just one second,

\* \* \*

(468) A. No, this is a habit pattern on the part of the patient and if he stubbed his toe the toe would hurt for longer than it should.

Q. Without it hurting him, it would be real pain to him? A. If he would be aware of it.

Q. He'd have real pain in the neck too, wouldn't he, doctor? A. I don't think the word real pain applies here because it is in the imaginary pain.

Q. But it isn't imaginary, perhaps to you doctor, what would it be to him? A. He feels it.

Q. He feels the pain.

Mr. Bushlow: Thank you, doctor. I have no further questions.

Mr. Sergi: No further questions, thank you.

(Witness excused.)

The Court: Put Mr. Keeler back on.

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Whereupon PAUL J. KEELER, previously sworn, resumes the stand, and testifies upon his oath as follows:

*Cross Examination (Continued) by Mr. Bushlow:*

Q. Mr. Keeler, have you had those photographs (469) there, I think Plaintiff's Exhibit AA in evidence. Photograph No. 4, now will you look at that photograph there and I mean, Mr. Keeler, will you look at that photograph please. Now, Mr. Keeler, I believe you testified that when the longshoremen were to put a box on the conveyor, they

*Paul J. Keeler, for Defendant, Cross*

would put the length on parallel with the conveyor? A. Yes.

Q. The reason they didn't do it the other way would hit the rails? A. Well, yes.

Q. Take a look at that box; that longshoreman got his hands on, has that been put on lengthwise, parallel with the conveyor? A. Yes.

Q. And would you tell me either the longshoreman is going to straighten it out or this box—

Mr. Sergi: Objection. How can he tell what a longshoreman is going to do in the photograph? It's standing still. Objection to the form of the question.

The Court: Sustained.

Q. (By Mr. Bushlow) Did that longshoreman place that box on there or was that placed by—

Mr. Sergi: Objection to the photograph from a—how do we know what happened before that or—  
(470) The Court: Sustained.

Q. (By Mr. Bushlow) Are there any boxes behind the box on which he, the longshoreman, has his hands? Is there a box behind it? A. Below it, yes.

Q. Below it? A. Yes.

Q. And is that box that the longshoreman has his hand on, straight and parallel with the conveyor? A. No.

Q. Is it at an angle? A. Yes.

Q. Is one side of the front of the box hitting the left hand side of the conveyor and the right hand side of the box hitting the—vice versa? A. The left forward corner is hitting the side of a rail and the back right-hand corner is not.

Q. That's not a proper way for a box to go up, is it? A. No.

Q. And the good safe practice would be for the longshoreman to straighten it out, wouldn't it? A. Well, a

*Paul J. Keeler, for Defendant, Cross*

safe practice is to put them on straight in the beginning.

Q. If they're not put on straight in the beginring,  
(471) you're going to leave them crooked?

Mr. Sergi: What do you mean, "he", you who—

Q. Would the longshoreman leave them that way?

Mr. Sergi: Objection.

The Court: Talking about good practice.

Mr. Bushlow: Good practice, yes.

The Court: Then phrase it that way. Otherwise,  
Mr. Sergi is going to be jumping up and down  
like a jack in-the-box.

Q. (By Mr. Bushlow) Is it good practice to leave them  
on uncovered? A. Good practice to do what?

Q. Is it good practice, if a box goes on, a box goes  
on not straight and parallel with the conveyor? Is it  
good practice to let that go all the way up that way or is  
it good practice to straighten it out? A. That is con-  
trolled by the man who's—

The Court: The question, is it good practice to  
straighten out or let it go up on a catty-corner?

The Witness: It is not good practice.

The Court: It's not good practice to let it go up on a  
catty-corner; is that right?

Q. Now, Mr. Keeler, you left McGrath about 1954; is  
that right? A. That is right.

(472) Q. At that time, McGrath was discharging banana  
ships at Pier 18, East River? A. 13, yes, I think we were.

Q. At that time, Mr. Keeler, they were discharging  
bananas in stems or stalks; is that right? A. And we  
had some boxes too.

Q. When you say "some boxes" did you have more than  
two? A. Yes.

Q. At that time, Mr. Keeler, did McGrath have their  
own equipment to discharge those bananas? A. Some of

*Paul J. Keeler, for Defendant, Cross*

it was our equipment and some of it belonged to Standard Fruit.

Q. And at that time, wasn't it a fact, Mr. Keeler, that these stems and stalks, were discharged on conveyor belts without any plate underneath with the trough in the middle as they came up? A. Yes. Stalks were discharged that way, yes.

Q. Isn't it a further fact that McGrath had something like a dumbwaiter that came up that you threw the stalk in and took it up like a dumbwaiter? A. That was later on. We got those and we got—we rented two from the United Fruit Company. But that came later in the contract.

Q. How much later? When did that come? Is that (473) before '54 or after '54? A. Gee, I couldn't tell you right now.

Q. You don't remember? A. '53, '54.

Q. Isn't it a fact, Mr. Keeler, that as they are loading bananas, January 15, 1970, with these conveyor belts, you yourself never supervised or were present in the unloading of bananas in that manner? A. No, that is not right.

Q. Where were you present and what year, what pier were you present when bananas were unloaded with conveyor belts with a plate underneath? A. I'm interested in bananas. One; I was with the American President Line, my old company used to be right across the canal from Mission Rock Terminal where my terminal was. And I went over there and I watched my old crowd discharging bananas and talked to my old friends. I was over there a lot.

Q. When was this? When, what year? A. Well, I was out there from 1951 until 1964.

Q. Where was this, in Mission Rock? A. San Francisco.

Q. Mission Rock, San Francisco? A. Yes. Then, I was up in Albany, Port Commission on a collision damage and I went over and watched the United (474) Fruit Com-

*Paul J. Keeler, for Defendant, Cross*

pany work my old company. I know Paul Carroll, the superintendent and I worked with his brother for years down here.

So, I went over to see Paul and I watched the ship worked. I discussed the ship with the—I discussed the boxes, I discussed everything.

Q. When was this that you went up? A. Year ago in the spring.

Q. Isn't it a fact, Mr. Keeler, that United Fruit does not use conveyors, they use the dumbwaiter type that comes over the vessel on a rail and goes down the hole? A. Yes. They have a marine leg and then they got conveyors.

Q. How long were you with this friend of yours on this banana boat in Albany last spring visiting someone and talking about bananas? A. At the most, an hour.

Q. One hour? A. Yes.

Q. Did you go on the vessel? A. I don't recall whether I did.

Q. So, you were just talking to somebody and you didn't see the operation, did you? A. (No response.)

Q. Yes or no, Mr. Keeler? (475) A. Mr. Bushlow—

Mr. Sergi: Wait, let him answer, please. Objection.

A. Mr. Bushlow, I don't have to go aboard the vessel all day to see what's going on. I have enough experience to walk down a dock and I can tell you everything that's going on in that vessel with one walk down and one walk back.

Q. Just a moment, Mr. Keeler. Just a moment. You are telling me you walk down a dock and there is a vessel on your left-hand side, completely enclosed. What I hope is maybe an inch or two-inch steel frame. You're going to tell me what's going on in the D deck? A. Probably I could tell you.

Q. Probably could tell me? A. Yes.

*Paul J. Keeler, for Defendant, Cross*

Q. Could you tell me while you're walking down the dock whether there are two men on the A deck and two men on the B deck? A. If I could look in the side port.

Q. But you told me you could tell me walking down the dock, walking down a dock you could tell me how many men were working in there? A. No, I couldn't tell you.

Q. Couldn't tell me that, could you? (476) A. No.

Q. Could you tell me the size of the conveyor that was down there, could you? A. Yes. I could see the top of it.

Q. From the C deck to the— A. Not from B to A.

Q. B to A? But from C to D you couldn't tell me? A. No.

Q. Couldn't tell me whether they were pineapples, grapefruits, coconuts or jelly down there, could you? A. I could see what's coming out.

Q. Couldn't tell me what's down there? A. You could.

Q. You could see what's coming out but not what's down there.

Now, Mr. Keeler, did you ever supervise the discharge of bananas as the bananas were discharged on January 15, 1970? With a conveyor belt from D deck to C deck and from C deck to B deck and from B deck to A deck? A. No.

Q. Never did? A. No.

Q. How many men are there in a banana gang? A. It varies.

Q. There can be twenty? (477) A. Yes.

Q. There can be thirty-five? A. There can be ninety, too.

Q. Ninety, too, right? Mr. Keeler, when they finish A deck and they finish B deck and they finish C deck, and now they're working on D, how many men are left on C deck, B deck and A deck? A. Generally there would be two men at the end of the conveyor just straightening the boxes out and one fellow pushing on a conveyor probably if the conveyor didn't—if it, if the gravity conveyor didn't have a good slant on them.

*Paul J. Keeler, for Defendant, Cross*

Q. That means three men then? A. Yes.

Q. Three men. Is that safe practice, to have three men? A. Under certain conditions, yes.

Q. Is it safe practice to have two men? A. Under certain conditions.

Q. Is it safe practice to have one man? A. Under certain conditions.

Q. Well, now let's take the conditions as existing on January 15, 1970. Are you aware, assume the conveyor from the D deck to the C deck—withdrawn.

Q. Do you know the size of the square of the hatch on the Polarstein? (478) A. No.

Q. Hatch number two? If I told you that it was thirty feet from forward to aft? A. Thirty feet in length and twenty wide was probably what it was.

Q. Thirty feet in length? A. And twenty wide.

Q. Twenty wide. That's thirty feet from the front to back, twenty feet from port to starboard? A. Yes.

Q. Now, assume in the square of the hatch right at the say forward end the conveyor goes from the D deck to the C deck and assume further that the bananas now are taken around on rollers right on this C deck and that the other end of the square, another conveyor goes up to B deck? A. Yes.

Q. Then, they're taken around again on B deck and another one goes over this first one to the A deck? A. Yes.

Q. How much distance is there between those two conveyors on the B deck? A. Well, that's hard to say. I don't know how they rig them.

Q. They don't generally send the bananas with one end of the hatch completely over to the other end? (479) A. At some intermediate point the other belt will go up. I have worked belts where we put them right next to each other like that; one belt come out and the other belt go up just as fast as we could. We made a manual transfer without rollers.

*Paul J. Keeler, for Defendant, Cross*

Q. Where did you do this, Mr. Keeler? What boat did you do this on? A. United Fruit Company.

Q. United Fruit Company. If I tell you United Fruit Company never had that they have used this dumbwaiter? A. No. We used belts plenty of times.

Q. What? A. We used belts plenty of times.

Q. Where, what port? A. Every time that—

Q. On what port, Mr. Keeler? Just give me a port. A. We—

Q. What port did you use these belts on? A. In New York.

Q. In New York, what pier? A. Pier 7, North River.

Q. And you used belts. You didn't use this dumbwaiter contraption? A. Yes, we did at times.

Q. If I tell you, Mr. Keeler, that those two conveyors, the ones from the C deck to the D deck and the (480) one from the B deck to the C deck, were at opposite ends of the square and were about thirty feet apart, how many men would it be safe practice to leave on that B deck during the unloading operation?

Mr. Sergi: I object to the form of the question. I don't know where he gets statement of fact. I haven't heard them in this trial, your Honor. He may know something we haven't heard.

The Court: No. I will allow the question as hypothetical.

Mr. Sergi: You have to have facts in the trial to have a hypothetical.

The Court: As a hypothetical it's up to the jury to determine what the facts are.

A. I would say in an operation like that where you're running that much gravity distance with gravity rollers, they would probably have the one belt rather higher than was coming out of the lower deck to give it a little gravity to run down to the other belt. So that transfers them off on to the belt that was going up to the next deck

*Paul J. Keeler, for Defendant, Cross*

and in that situation they would have a man running the top of the belt. They would—he could or could not be assisted by another man according to whatever match they made between the belt and the gravity rollers. And, according to the steepness of the grade that they had on the gravity rollers, they would have either (481) one or two men pushing.

I don't know whether they had one or two. Because, I don't know exactly how this was rigged but I so say, I would say there would be two on the gravity rollers and then maybe one or two guiding them on to the other belt.

Now, it would be six men, it would be one, two and one, it would be four, five or six.

Q. Mr. Keeler, would there be more than one? Would there be more than one? A. Yes.

Q. Now, Mr. Keeler—

Mr. Sergi: I didn't hear the answer.

Mr. Bushlow: He said, "Yes."

Q. Mr. Keeler, when you have a man who is standing on C deck and operating the belt, coming from D deck to C deck, now to operate this belt I think you testified puts his foot on the pedal, right? Got to keep his foot down and operates the belt? A. Yes.

Q. If he takes his foot off, what happens? A. Stops.

Q. He's anchored there, isn't he? A. No.

Q. He's not anchored there? A. No. He doesn't do it the way you're doing it.

(482) Q. How does he do it, show me. A. Yes. He does it with both feet. He just stands there, this foot is on the pedal, all he does, lift his toe up and down same way you do on this car.

Q. Fine. But if he moves from here and moves over here what happened to the belt? A. He can still do it. He kicks the board along with him.

Q. What? A. He brings the board along with him, the board on the wire he brings it right with him.

*Paul J. Keeler, for Defendant, Cross*

Q. How far can he bring the board? A. He has, as far as he has to go on the end of the machine.

Q. If, at the other end of the machine that's going from B to A, if something jams up there and the boxes don't go on properly and there is no man there, what does this man have to do? A. Stop the belt.

Q. Stops the belt. When he stops, what happens to the belt from D to C? What does the man do down there? A. It's the lower belt that he's stopping. He stops that belt.

Q. This is C to B. What about D to C when he stops that belt.

Q. This is C to B. What about D to C when he stops his—what does the man do on the C deck? (483) A. Let's go over that again. You got the belt from where to where?

Q. D to C, C to B and B to A. A. Right.

Q. I'm talking about the man on the B deck, now. A. On B deck.

Q. B deck. He stops his belt, yes? He's getting the bananas that are coming from C deck. A. Right.

Q. What does the man on C deck do when he sees this belt stop? A. He stops the one.

Q. What does the man on A deck do when he sees that is stopped, he has stopped his belt? A. He doesn't have to worry. He's just, he's looking ahead of himself. He's the one that's stopping all the belts because he's the one—he's trying to get the fruit to go out of the ship.

Q. Now, when this man on A deck looks down at the end of his conveyor and sees that a box is going on wrong, what does he do? A. Man on A deck? He's not looking down there to start with.

Q. Where is he looking? A. Are you talking about a belt that's stopped or (484) is this—

Q. I'm talking about, there is a conveyor going here and a man on A deck A. Your operation is going now?

Q. Yes. A. Then he's looking down.

*Paul J. Keeler, for Defendant, Cross*

Q. Of course. Now, he sees boxes going on wrong from B to A and what does he do? A. He stops the belt.

Q. What does the C—the man on B deck do who's operating the belt from B to C? If A stops what does B do? A. Well, if the top belt stops the other fellows have got to stop in rotation.

Q. And if this box is going on wrong and there is nobody else down the hole on B deck but the operator of this belt, who is going to go over and straighten out this box? A. Anybody. The minute the belt stops any of the longshoremen do it. The operator himself can do it, anybody can do it, anybody in the ship.

Q. But if there were a man, if there was a man at the bottom of the conveyor from A to B to guide these on properly, would he have to stop his machine because of an improper box that came on because no one was there? A. He would have to stop it if there was any danger of the box falling off or damaging cargo. Just as (485) important to protect the cargo as it is to prevent the box from falling.

Q. Is it just as important to prevent, to protect the cargo as to prevent injury to the men? A. No. Many a box could fall off and there'd be no men beneath them. The men might not be working but you just don't want the box to fall off and hit on the dock. You got one box of mashed bananas.

Q. So, therefore, Mr. Keeler, in your role as an expert, it would be better practice and safe practice to have a man running the conveyor on B deck from C to B and another man standing at the bottom of the conveyor from B to A to see that the boxes went on properly; isn't—wouldn't that be better practice? A. There is a man at the bottom of the conveyor.

Q. There should be a man at the bottom of the conveyor; is that right? A. Many places have a transfer to the conveyor and you got to have a man.

*Paul J. Keeler, for Defendant, Re-direct*

Q. That means that where there is, you operate the conveyor, there is a man and you got to have a man at the other end where there is a transfer from the roller to the conveyor? A. Yes.

Q. Should have a man there? (486) A. Yes. That's a normal practice.

Mr. Bushlow: Thank you very much.

*Re-direct Examination by Mr. Sergi:*

Q. I understand what you're saying, there should be at least two men at each deck? A. Yes.

Q. The fellow has his foot on the pedal to make sure if something happens on that conveyor he should stop and there should be another man on the same level so that if one of the boxes is not put on properly by the longshoreman that he, the longshoreman should straighten it out? A. Yes.

Q. If there is only one man there at that particular deck, then the stevedore should have provided more than one, isn't that correct? A. If he needed it, yes.

Q. You said they needed it. Now, if there isn't more than one man at that particular deck level and the man working the pedal can't reach down to adjust the box that's not on straight and the conveyor does not stop in time and the boxes keep coming up, what will happen, Mr. Keeler? A. The box is up to the top and then, they start to pyramid up at the top of the machine.

(487) Q. After they pyramid up, what's going to happen? A. They start to fall off.

Q. Tumble down is that correct? A. Yes.

Q. And it doesn't matter how high the sides are, isn't that correct? A. That's right.

Q. It doesn't matter how high the boxes are at that rack?

Mr. Sergi: Thank you.

*Paul J. Keeler, for Defendant, Re-cross*

*Re-cross examination by Mr. Bushlow:*

Q. But if there was a man down there to see the boxes got on right, this wouldn't happen, would it? A. All according how diligent he was.

Q. Well, assuming that it was a diligent longshoreman, it wouldn't happen, would it? A. I can't say that.

Q. One more thing, Mr. Keeler. You remember during the McGrath operations at Pier 13 the time you were there, you said you had conveyors without sides on them: is that right? A. No, I said—

The Court: I think it's improper recross, too.  
(488) You're going back over the same stuff.

Mr. Bushlow: I have just one more thing to say.  
The Court: I'll allow it. Go ahead.

Q. Let me understand you correctly, when you worked for McGrath on this banana—

The Court: I think it was in connection with United Fruit, said there were no sides.

Q. What about McGrath? Did they have sides on their conveyors? A. No. We were principally using a route belt.

Q. And did you use those for boxes, too? A. Yes.

Q. And did there come a time, sometime when you put a plate underneath them to use them for the boxes? Used to substitute a plate? A. I don't understand what you're talking about.

Q. Well, the belt came down with a belly; is that right?  
A. With the belly.

Q. Or through in the middle? A. Yes, a cross-section.

Q. Right. Now, did you when you got the boxes, did you use the exact same belt or did you try to modify that machine? (489) A. We used the same belt until we got a lot of boxes and then we modified the machine.

Q. What did you do when you modified the machine?  
A. We just made the—we moved out the side rollers and

*Paul J. Keeler, for Defendant, Re-cross*

just made the bottom a little flatter and the belt a little wider.

Q. Did you put any rails on them? A. No.

Q. Mr. Keller, in your experience with McGrath unloading bananas, did you ever see your stevedores, your longshoremen, using plywood which they tied down on the conveyors in order to make a side?

Mr. Sergi: Objection to what somebody else did, your Honor.

Mr. Bushlow: No, he did it.

Mr. Sergi: Objection. We're talking about Standard Fruit, January 1970.

The Court: Yes. I think what someone may have done in the course—

Mr. Bushlow: I'm going into the competency, your Honor, where he said he had never seen belts, side rails used for boxes.

The Court: Wait a minute. Now, he gave this testimony as to his term of service with United Fruit, 1930, 1938. What's that got to do with this (490) case?

Mr. Bushlow: McGrath, your Honor, 1954.

The Court: Is that right?

The Witness: Yes. McGrath was doing that work in '54, I think.

The Court: With no sides?

The Witness: Without sides.

The Court: Flat conveyors?

The Witness: No, we had—

The Court: Troughs?

The Witness: Yes, round conveyors.

The Court: Objection is sustained.

Q. Did McGrath use side boards on their conveyors with the boxes?

*Paul J. Keeler, for Defendant, Cross*

Mr. Cichanowicz: Objection.

The Court: He's already answered it, used troughs.

Mr. Bushlow: Well then—I have no further questions.

*Cross Examination by Mr. Hart:*

Q. Mr. Keeler, would you say two men would be adequate to conduct the operation of the conveyor and also straighten the boxes as they come off the rollers? (491)

A. Yes.

Q. Did you hear Mr. Willie Jackson testify the other day? A. No.

Q. Let me read Mr. Jackson's testimony to you:

"Question: How many men are on the A deck with you?"

Bear in mind, this crate that came off this box, came from A deck.

"Answer: One more, two with me one and—

"Question: Is two altogether now. You told me what your job is to stand at the machine?

"Answer: Yes.

"Question: What does the other man do?

"Answer: The other man stands at the door.

"Question: Stands at the door?

"Answer: Yes.

"Question: And is that, those are double doors where the bananas come out on the piers?

"Answer: Yes.

"Question: And what does he do there, what's his job?

"Answer: He is standing there straightening the boxes.

"Question: Is he the—boxes going out and (492) going around to the truck; is that right?

"Answer: Yes."

*Paul J. Keeler, for Defendant, Cross*

Now, there is two mean there wasn't that right? A.  
Yes. One at the top of the belt and he's explaining where  
the gravity rollers on the deck—

Q. Now, in your opinion, as an expert, wouldn't you say  
that was an adequate number of men for the job at hand?  
A. Yes.

Mr. Hart: Thank you very much.

Mr. Bushlow: I have no further questions.

The Court: All right, Mr. Keeler.

We'll take a five-minute recess, ladies and gentlemen,  
but don't discuss the case.

(Whereupon a recess was taken at 3:45 o'clock P.M.)

**Charge.**

(3) (The jury enters the courtroom at 10:10 A. M.)

The Court: Good morning, ladies and gentlemen. Would you please be seated?

Now, ladies and gentlemen, I'm going to give you a charge on the law. It's my practice to read the charge which makes it a little bit more difficult for you to follow, but I think it minimizes the risk of error. So that please try and pay close attention. I'm glad to see you sitting up there, Mr. Sergi. I was going to ask you to sit up there because I don't speak that loud. If my voice starts to fall off, if any of you don't hear me at any point, please raise your hand and let me know.

Now, you've heard the evidence and the argument and the time has come to instruct you as to the law governing the case. Although you as jurors are the sole judges of facts, you're duty-bound to follow the law as stated in the instructions of the Court and to apply the law <sup>so</sup> given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law regardless of any opinion you (4) may have as to what the law ought to be. It would be a violation of your sworn duty to base a verdict upon any other view of the law other than that which is given in the instruction of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff, Michael Castellano, and the answer thereto of the defendant, Rudolf Oetker "Polarstein." You are to perform this duty without bias or

*Charge*

prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence and follow the law as stated by the Court and weigh and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equally and are to be dealt with as equals in a court of justice.

As has been said to you several times during the course of the trial, your sole concern in this (5) lawsuit are the issues between the plaintiff and the defendant shipowner. You are not to consider or be concerned in any way with any issue of liability, negligence, unseaworthiness, damages, and so forth, with respect to either of the two other defendants, who are so-called third-party defendants in this case. Those questions are for the Court and the Court alone.

The burden is on the Plaintiff in a civil action such as this to prove every essential element of his case by a preponderance of the evidence. If the proof fails to establish any essential element of the Plaintiff's case by a preponderance of the evidence, then you should find for the defendant.

Similarly, on the question of contributory negligence about which I will say more to you later, the burden of proof by a preponderance of the evidence is on the defendant. To establish by a preponderance of the evidence, means to prove that something is more likely than not so. In other words, a preponderance of the evi-

**211a**

*Charge*

dence means such evidence as one considered and compared to that opposed to it has more convincing force and convinces you in your mind as to what is believed more than not to. In other words, if the evidence on the issue is evenly balanced or does not (6) establish what actually happened, then the party bearing the burden on the issue has not sustained his burden on the issue.

Mere speculation that the jury may have been caused by an unseaworthy condition or by negligence is not sufficient to sustain this burden. Proof of the happening of an accident does not shift to the defendant the burden of establishing the accident did not occur through its fault nor does it create presumption of fault. The legal presumption that the defendant exercised reasonable care in determining whether the fact in issue has been proved, by a preponderance of the evidence in the case, the jury may unless otherwise instructed, consider the testimony of all witnesses regardless of who may have called them and all exhibits received in evidence, regardless of who may have produced them.

There are, generally speaking, two types of evidence from which a jury may properly find a truth as to the facts of the case; one is, direct evidence such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a changed circumstance pointing to the existence or non-existence of certain facts. As a general rule, the (7) law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

*Charge*

Statements and argument of counsel are not evidence in the case unless made an admission or stipulation of fact.

When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as conclusively proved. The Court may take judicial notice of certain facts or events when the Court declares it will take judicial notice or fact or accept the Court's declaration as evidence and regard it as conclusively proved, the fact or event which has

ally been noticed. Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses regardless of who may have called them. All the exhibits received in evidence, regardless of who may have produced them. All facts may have been admitted or stipulated and all facts and events which may have been judicially noticed and all applicable (8) presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the Court and any evidence or stricken by the Court, must be entirely disregarded. Anything you may have seen or heard outside the courtroom touching the merits of the case is not evidence and must be entirely disregarded. You are to consider only the evidence in the case but in your consideration of the evidence, you are not limited to the bald statements of the witnesses.

In other words, you are not limited solely to what you hear and see as the witnesses testify. On the contrary, you are permitted to draw from facts which you find have been proved such reasonable inferences which seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense leave the jury to draw from the established facts. Presumptions are deductions or con-

*Charge*

clusions which the law requires the jury to make and prevails unless overcome or outweighed by evidence to the contrary. The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions.

(9) An exception to this rule exists as to those whom we call expert witnesses. Witnesses who by education and experience have become expert in art, science, profession or calling, who may state an opinion as to relevant and material matters in which they profess to be expert and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide the opinion of an expert witness is not based upon such sufficient education and experience or if you should conclude the reason given in support of it is not sound, you may reject the opinion entirely.

The nature and extent of the injury, if any, which proximately resulted from an accident, may not be proved by evidence or statements as to aches or pain or injuries made to a doctor by a patient in connection with the doctor's observation or treatment. Such statements are received in evidence only for the purpose of enabling the doctor to tell you everything upon which he may have based any opinion expressed as to the patient's physical or mental condition. The opinion of a doctor as to the condition of a patient (10) may be based entirely upon objective symptoms revealed through observation, examination tests or treatment. Or the opinion may be based entirely upon subjective statements revealed only through statements made by the patient. Or the opinion may be based in part upon objective symptoms, in part upon subjective symptoms. To the extent that any opinion testified to by a doctor is based upon subjective symptoms, described to him by a patient, the jury may, of course, consider

*Charge*

the accuracy of the patient's statements and determine the weight to be given the doctor's opinion.

You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves. Ordinarily, it is assumed a witness will speak the truth. But this assumption may be dispelled by the appearance and conduct of the witnesses or by the manner in which the witness testifies or by the character of the testimony given or by evidence to the contrary of the testimony given. You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of (11) mind, and demeanor and manner while on the stand. Consider also any relationship each witness may bear to either side of the case. The manner in which each witness might be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more witnesses witnessing an incident or transaction may see or hear it differently. An innocent recollection, like failure of recollection is not an uncommon experience. In weighing the effect of a discrepancy always consider whether it depends on a matter of importance or unimportant detail and whether the description is an innocent error. After making your own judgment, you will give the testimony of each witness such credibility as you may think it deserves. A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something or failed to do or say anything which is inconsistent with the witness' present testimony.

*Charge*

(11a) If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

(12) If a witness has shown knowingly to have testified falsely concerning any material matter you have a right to distrust such witness' testimony in other particulars and you may reject all the testimony gave or give it such a credibility as you may think it deserves. And after an omission is knowingly done if done voluntarily and intentionally not because of mistake or accident or other reason. Now, you have this case, a suit for damages for personal injuries brought by the plaintiff against the defendant shipowner. This suit is based upon two separate individual grounds: namely the claim of negligence and the claim of unseaworthiness. Either ground or both would support the verdict for the plaintiff and if so found by the jury, under the instructions from a preponderance of the evidence in the case, the shipowner denies that allegation of negligence and also denies the charge of unseaworthiness. This defense would support a verdict for the shipowner if so found by the jury under the instruction from the preponderance of the evidence in the case.

Now, certain facts have been stipulated and I will read you a summary of those facts. It is stipulated between the parties that 1) "Defendant Oscar owned the S. S. Polarsteen. 2) The S. S. Polarsteen (13) was berthed at Pier 42, East River, New York on January 15, 1970. 3) The third-party defendant, Bay Ridge Operating Co. installed, rigged, unrigged, and repaired and maintained the conveyor equipment aboard the S. S. Polarsteen including operation and control of said conveyor equipment. 4) The third-party defendant Standard Fruit & Steamship Co. owned the conveyor equipment used for the S. S. Polarsteen on January 15, 1970. 5) The third-party

*Charge*

defendant, Bay Ridge Operating Co. was working aboard the S. S. Polarsteen, on January 15, 1970. 6) Plaintiff was lawfully aboard the S. S. Polarsteen as an employee of Bay Ridge Operating Co., Inc., engaged in the performance of maintenance work about 10:30 p.m. on January 15, 1970. 7) The sum of \$2,184.94 was expended on behalf of plaintiff for his treatment, which according to the parties was fair and reasonable but according to the defendant was not necessary."

Now, the plaintiff is not entitled to recover damages merely because he sustained an accident aboard a vessel. In order to recover damages the plaintiff must establish by a preponderance of the credible evidence that the defendant Oscar, breached a duty which it owed to the plaintiff, the duty which he (14) breached, was the proximate cause of the accident to the plaintiff. The plaintiff first claims damages for personal injuries alleged to have been suffered as a proximate result of the negligence of the defendant shipowner at the time and place in question. The plaintiff contends the defendant shipowner conduct was negligent and that the shipowner failed to exercise ordinary care under the circumstances to furnish the plaintiff with reasonably safe equipment and a reasonably safe place in which to work. Specifically, the plaintiff claims: that the defendant shipowner was negligent in one or more of the following particulars: 1) that the shipowner failed to provide plaintiff with a safe place to work and more specifically; 2) that the shipowner allowed the plaintiff and other longshoremen to work in the lower hold of the vessel while an unsafe method of discharging cargo, was being used. There was an insufficient number of men to safely perform the work.

On the question of negligence, negligence is the doing of some task which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do whether prompted by consider-

*Charge*

ation, which ordinarily regulates the (15) conduct of human affairs. It is in other words the failure to use ordinary care under the circumstances in the management of one's own personal property. Ordinary care is that care which a reasonably prudent person, in order to avoid injury to themselves and their property or their persons or the property of others. Ordinary care is not an absolute term but a relative one. That is to say, in the deciding whether ordinary care is exercised in a given case the conduct in question must be viewed in light of all the surrounding circumstances as shown by the evidence in the case.

Now, from time to time I will discuss the question of approximate cause. I will refer to approximate cause as well as negligence and seaworthiness. Approximate cause is defined as follows: an injury or damage is approximately caused by an act or failure to act when either it appears from the evidence in the case that the act or omission plays a substantial part in bringing about or actually causing the injury or damage. And that the injury or damage was either a direct result or a probable one. A reasonably possible consequence of the act or omission. By approximate cause is meant an unbroken chain of events, flowing (16) from the unseaworthy condition or negligent act and leading to the physical injury. If the chain of events flowing from an unseaworthy condition or negligent act is broken by some other unforeseeable intervening act, which causes the injury and approximate cause is not established and the verdict must be for the defendant.

Now, again on the question of negligence, any negligent act or omission of an officer, employee or other agent of the shipowner in the performance of his duties, is held by law to be the negligence of the shipowner. The captain, the mates, and members of the crew of the S. S. Polarsteen and all other employees of the S. S. Polarsteen

*Charge*

at the time and place in question, were the agents of the shipowner. The stevedoring crew of longshoremen including the so-called ship boss, hatch bosses, dockmen and all other employees of the stevedoring company, at the time and place in question, including plaintiff, were agents of the stevedoring company not of the shipowner.

Now, you cannot find the shipowner negligent unless the plaintiff established by a preponderance of the credible evidence that the alleged unsafe condition existed and the shipowner had actual or constructive knowledge of it. To prove notice, the (17) evidence must establish either that an agent or employee actually saw the alleged unsafe condition prior to the accident or that the condition was such a size and visibility and existed for such a length of time prior to the accident it could have been discovered on a reasonable inspection.

It was the particular duty of the defendant shipowner at the time and place of the accident in question to use ordinary care and under the circumstances, to furnish the plaintiff with reasonably safe equipment and a reasonably safe place to work aboard the ship. And to use ordinary care under the circumstances to maintain and keep the place of work and the ship's equipment used and carrying on the work in a reasonably safe condition. This continuing duty to use ordinary care under the circumstances owed by the shipowner to the longshoremen, while aboard the ship, exists independently and is separate from any other duty owed to the longshoremen and by other, including the stevedoring company as employed, employer and cannot be transferred or shifted by the shipowner to anyone else. If the ship or ship's equipment is in a dangerous condition the dangerous condition is not readily apparent to a person exercising ordinary care and caution (18) under the circumstances, if the shipowner has actual knowledge of its dangerous condition or if the dangerous condition is such to have been known to the ship-

*Charge*

owner and the exercise of ordinary care under the circumstances, then the law imposes upon the shipowner the duty of such danger. But the shipowner is not charged of knowledge of defects which reasonable inspection would not include. The ship under tow and the longshoremen will see and observe that which would be obvious through the use of an ordinary person's senses such as was reasonably to be expected under these circumstances. So there is no duty on the part of the shipowner to give the longshoremen notice of an obvious danger or a danger that would have been apparent to a reasonably prudent person exercising ordinary care under these circumstances shown by the evidence in the case.

However, in the absence of appearances that cautioned him or would caution a reasonably prudent person exercising reasonably and ordinary care, the plaintiff had the right to assume and act upon the assumption his place of work aboard this ship and the equipment and any equipment furnished by the ship owner, with which to carry on his work as a longshoreman, (19) were reasonably safe under the existing circumstances. This does not mean, of course, that the shipowner was a guarantor or insurer of the safety of plaintiff. The extent of the shipowner's duty under the plaintiff's claims of negligence was nothing more than to exercise ordinary care under the then existing circumstances. By way of defense to the plaintiff claim the defendant shipowner not only denies that the conveyors were unseaworthy and says they're use and operation did not render the ship unseaworthy, but further denies it was any negligence on the part of the shipowner, which approximately caused the injury or damage to the plaintiff. The shipowner also alleges that if the accident was caused by the negligence of anyone it was the negligence of the plaintiff himself or the negligence of his employer, the stevedoring company, which was the sole and only approximate cause of the accident and of any consequent injury or damage to the plaintiff.

*Charge*

If you should find from a preponderance of the evidence in the case that negligence on the part of stevedoring company or any of its employees including the plaintiff was the sole, the only approximate cause of the accident, and if plaintiff cannot recover from (20) defendant ship-owner and your verdict on the plaintiff's negligence claim should be in favor of the shipowner. The defendant ship-owner further alleges that even if it be found from a preponderance of the evidence in the case that there was some negligence on the part of the shipowner, which was the approximate cause of any injuries or consequent damages which plaintiff may have sustained, plaintiff himself was nevertheless guilty of contributory negligence which reduces the amount, will otherwise be entitled to recover. Contributory negligence is default on the part of the person injured which cooperates in some degree with the negligence of another so he is bringing about the injury. By the defense of contributory negligence, the defendant, in effect, alleges even though the shipowner may have been guilty of some negligent act or omission which was one of the approximate causes, the plaintiff himself by his own failure to use ordinary care under the circumstances for his own safety at the time and place in question, also contributed one of the proximate causes of injuries and damages the plaintiff may have suffered. The burden is on the defendant who alleges the defense of contributory negligence to establish by a preponderance of the evidence in the case the claim (21) that the plaintiff himself also was at fault and contributed to one of the approximate causes to any injuries and consequent damages plaintiff may have sustained.

The defendant shipowner alleges that at the time and place of this that the plaintiff then there failed to use ordinary care other than existing circumstances for his own safety by working underneath the conveyors and the open hatch, by failing to observe the conditions surrounding him in his work and by failing to notice the danger

*Charge*

which was obvious. Would have been obvious to any reasonably prudent person exercising ordinary care under the then existing circumstances. If you find that the plaintiff's company, his superiors or employees were negligent in any respect, such negligence is not be imputed to the plaintiff nor chargeable to the plaintiff, and he, the plaintiff, is responsible and liable only for his own negligence, if any. The issue to be determined by the jury in this case as between the plaintiff and the defendant ship owner on the negligence claim are these: 1) first, was the shipowner negligent in one or more of the particulars alleged; if the unanimous answer to that question is no, you will return a verdict for the defendant shipowner. (22) But if your unanimous answer is yes, then, you have a second issue to determine and I'll interrupt after this point to state it to you that I'm going to address and give you certain interrogatories containing six questions. The first two questions are the first two questions I'm reading to you now, so perhaps I'd better read them to you again so you'll understand. I'll pick them out as we go along.

The issues between the plaintiff and defendant shipowner are the negligence claim are these: 1) was the shipowner negligent in one or more of the particulars alleged; if your unanimous answer to that question is no, you will return a verdict for the defendant shipowner. But if your unanimous answer is yes, then you have a second question to determine; namely, second, was the shipowner the approximate cause of any injury and damage to the plaintiff? If your unanimous answer to that question is no, you will return a verdict for the defendant shipowner. But if your unanimous answer is yes, then you must find the answer to my third question; the third question is, not among the interrogatories. Namely; is the plaintiff guilty of some contributory negligence? If you should find from the preponderance of the evidence in the case that he was (23) not, then having found in plaintiff's favor

*Charge*

in answer to the first two questions on the claim of negligence, you will proceed to determine the amount of plaintiff's damages. On the other hand, if you should find from a preponderance of the evidence in the case that plaintiff himself was guilty of something and the plaintiff's fault contributed to the approximate cause of the injuries and damage which plaintiff may have sustained, then you must compare the negligence of the parties and return a verdict in favor of the plaintiff for a reduced amount based on that comparison. The proper procedure to be followed by the jury in preparing the negligence of the parties and return a verdict in favor of the plaintiff for a reduced amount, based upon that comparison is is: 1) determine the full amount of all damages sustained by the plaintiff as approximate result of the accident. Negligence, compare the negligence of the fault of the parties by determining in what proportion persons, plaintiff's own fault contributed as approximate cause of all damages suffered by the plaintiff as approximate result of the accident. Then reduce the faults by subtracting a percent of the total you find from a preponderance of the evidence in the case which was caused by (23a) plaintiff's contributory negligence and return a verdict in favor of plaintiff for the amount remaining.

(24) Now, it is necessary for the jury to make a finding in this case on the issue as to the shipowners alleged to be negligence as well as a finding on the issue as to the alleged to be unseaworthiness because the law gives a longshoreman two possible claims against a shipowner; one based on possible unseaworthiness and the other based on possible negligence of the shipowner. But, of course, there can be only one recovery of damages for the same personal injury the finding against the ship as to unseaworthiness, and issue as to negligence. On the other hand, if the jury should find from a preponderance of the evidence in the case negligence on the part of the stevedoring company

*Charge*

or any of its employees, including plaintiff in doing the unloading work, the sole and only proximate cause of the injuries sustained by the plaintiff, then the plaintiff may not recover anything from the defendant shipowner on the question of negligence, and your verdict should be in favor of the defendant. The mere fact that an accident happens standing alone does not permit the jury to draw the inference the accident was caused by either unseaworthiness or negligence. Although, a longshoreman never assumes the risk of injury from any negligence of another or from any unseaworthiness of the vessels. It is a fact, (25) common knowledge, almost every occupation aboard ship, there is some inherent unavoidable risk which does not arise out of unseaworthiness. When he entered upon his calling, must assume all inherent and unavoidable risk of his occupation as all persons must. No person may recover for injuries resulting solely from such inherent unavoidable risk.

Now, the plaintiff also claims damages for personal injuries alleged to have been suffered as a proximate result of the unseaworthiness of the conveyors and their operation and use in the discharge of the boxes of bananas from the lower holds. Liability based upon unseaworthiness is solely distinguishable and separate from liability based upon negligence. Since unseaworthiness is a condition and how that condition came into being and by whomever created it, whether by negligence or otherwise, is quite irrelevant to the shipowner's liability for personal injuries resulting from such condition, if any. Now, the plaintiff claims that the conveyors and their operation and use were in an unseaworthy condition and one or more of the following particulars; one, the railguards on the conveyors were inherently unsafe and unseaworthy when the larger boxes of bananas were being discharged. Two, (26) that there were no safety nets rigged on the conveyors. Three, that there were insufficient or inadequate personnel

*Charge*

operating the power conveyors which constituted an unsafe method of discharge. Also, the vessel was unseaworthy.

Under Maritime law, including loading, things placed upon the vessel, and to keep, maintain the ship, all decks and passageways apply, gear and equipment, tools of the vessel in a seaworthy condition at all times. To be in a seaworthy condition means to be in a condition reasonably suitable and fit to be used for the purpose or use for which provided or intended. An unseaworthy condition may result from the lack of inadequate crew, the lack of an adequate manpower to perform a particular task on a ship or improper use of otherwise seaworthy equipment. It is not in any way dependent upon negligence or fault or blame. That is to say, the shipowner may be liable for all conditions existing at any time even though the owner may have exercised due care and may have had no knowledge of the unseaworthy condition which approximately caused the injury or damage.

The issues to be determined by you, between the plaintiff and the defendant shipowner on the (27) claim of unseaworthiness are these; first, were the conveyors unseaworthy at the time and place of the accident or did their operation and use in the particular claimed by the defendant, render the ship unseaworthy at the time and place of the accident? If your unanimous answer to both these questions is no, you should return a general verdict for the defendant shipowner on the claim of unseaworthiness. But if your unanimous answer is yes to either or both of these questions, then you have a second issue to determine; namely, was any injury or damage to the plaintiff approximately caused by such unseaworthiness? If your unanimous answer to this question is no, you should return a verdict for the defendant shipowner on the claim of unseaworthiness. If your unanimous answer is yes, you

*Charge*

will determine the amount of the plaintiff's damages if any under the instructions and from a preponderance of the evidence in the case.

As indicated above, the plaintiffs' proof of contributory negligence if any, is upon the defendant shipowner. Furthermore, contributory negligence is not a complete part of plaintiffs recovery but it can only be invoked in diminution of damages to the extent that you find the plaintiff contributed to his injuries if (28) in fact he did so. Thus, in the event that you do find from a preponderance of the credible evidence that the plaintiff sustained an injury approximately caused by an unseaworthy condition of the vessel, you must also consider whether such injury was caused or contributed to by the fault or negligence on the part of the plaintiff. The plaintiff was under the duty to take such measures, action for his own safety and well being as you would expect any well being, prudent man to take under similar circumstances.

Any damages which you might find the plaintiff otherwise entitled to recover from the defendant must be reduced by the comparative method heretofore outlined above to the extent that you find that plaintiffs own negligence or faults contributed to the happening of the accident. If you find any unfitness of the vessel equipment, then it does not matter as far as defendants liability is concerned how long or how short a time the condition of unfitness may have existed prior to the accident. Nor does it matter that the defendant did not know its existence before the injury occurred. The lack of time and the defendants knowledge or lack of knowledge are not pertinent here if the elements of the plaintiffs claim are established. The plaintiff (29) is not required to prove that the entire ship was unseaworthy, that is that she would sink if she attempted to float. All that he must prove is that the equipment involved was not reasonably fit for its intended purpose and that he was injured as a result of that. The mere fact that the plaintiff suffered

*Charge*

an injury on board the ship itself does not establish this vessel was unseaworthy or that the ship owners were negligent. To be seaworthy, does not mean that the vessel is perfect in all respects and is accident free. It means only that a vessel is reasonably fit for its intended purpose. Under the warranty of seaworthiness, the ship owner is not an insuror of the plaintiff's safety.

Now, a ship is not rendered unseaworthy because of an isolated negligent act of another longshoreman employed by the stevedore, even if such an act resumes an injury to plaintiff. If you find the vessel itself, gear and equipment were reasonably safe for their intended purpose then that plaintiff's injury, if any, was caused by the negligence of a fellow longshoreman, you cannot find the vessel unseaworthy. In order to prove the essential elements of plaintiff's claim, the burden is on the plaintiff to establish by a preponderance of the evidence in the case the following facts (30) first, the defendant ship owner was at the time and place in question negligent in one or more of the particulars alleged or that the conveyors were in an unseaworthy condition or that their operation and use rendered the ship unseaworthy. And second, either ship's owner negligence or unseaworthy condition was approximate cause of this injury and consequent damage sustained by the plaintiff. In the absence of unseaworthiness of the vessel or negligence or the ship's officers and crew there is no liability on the part of the ship owner.

Now, I'll proceed from this to the question of damages but the fact that I discuss the damages with you should not be considered as intimating any view of the court as to which party is entitled to prevail in this case. Instructions as to the measure of damages are given for your guidance in the event that you find from the evidence in favor of the plaintiff. Plaintiff alleges by reason of his claimed injuries approximately resulting from

*Charge*

the accident involved in this case, he has sustained so-called special damages and the amount of medical bills or treatment bills of \$2,184. some cents. And lost earnings of approximately \$12,600.00. These allegations are not evidence, of course, except to the extent they have been so stipulated as I indicated (31) but merely extend, indicate the extent of the plaintiff's claims and must not be considered by you as evidence except to the extent as I have indicated they have been stipulated. If under the court's instructions you should find the plaintiff is entitled to a verdict in arriving at the amount of the award, you should include \$2,184.00 of medical treatment expenses, which have been stipulated provided you find that they have been necessarily incurred. If under the court's instructions you find that the plaintiff is entitled to a verdict in arriving at the amount of the award, you should include the reasonable value of the time, if any, necessarily lost up to date by the plaintiff since the injury because of being unable to pursue his occupation as a proximate cause of the injury. In determining this amount, you should consider evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury and find what he was reasonably certain to have earned during the time so lost had he not been disabled. If under the court's instructions you should find the plaintiff entitled to a verdict, you will award him a sum which will compensate him reasonably for one, any pain suffering and mental anguish (32) already suffered by him and approximately resulting from the injury in question; and two, for such pain, suffering and mental anguish, if any, as he is reasonably certain to suffer in the future from the same cause. According to the life expectancy tables, the life expectancy of a person thirty-seven years of age, such as the plaintiff is thirty-six years, this fact of which the court takes judicial notice, is now in evidence to be

*Charge*

considered by you in arriving at the amount of damages if any, to be awarded in the event that you find the plaintiff is entitled to a verdict. The life expectancy as shown by the mortality table is a mere estimate of the probable average remaining length of time of all persons in our country of a given age, and that estimate is based on not a complete, but a limited record of experiences. So the inference which may be drawn from the life expectancy table, in considering the life expectancy of the plaintiff, you should consider in addition to what is shown by the plaintiff of mortality, all other facts and circumstances in evidence, bearing on the life expectancy of the plaintiff including his occupation, habits and state of health. It is the duty of any person who has been injured to use reasonable diligence, (33) reasonable means under the circumstances to prevent the aggravation of such injury to effect a recovery therefrom. Damages must be reasonable.

In the event that your verdict is for the plaintiff, you may award him only such damages as will fairly and reasonably compensate him for the injuries or damages which you find in the preponderance of all the evidence in the case he has sustained is an approximate result of the accident. You are not permitted to award speculative damages. This means, you are not to include in any verdict compensation for prospective loss which although possible, is wholly remote or conjecture. You are not to assess damages for any injury or condition from which the plaintiff may have suffered or may not now be suffering unless it has been established by preponderance of the evidence or such injury or it was approximately caused by the accident in question.

If under the court's instructions you should find the plaintiff is entitled to a verdict in thinking about the amount of your award, you may not include in or add in otherwise just an award, any sum for the purpose of punishing the defendant or to set an example. Nor does

*Charge*

the law allow you to include in your award any sum for the payment of court costs or attorneys fees.

(34) Again the fact I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine to which a party is entitled to prevail in this case. The instructions measuring damages are given for your guidance in the event that you find from the evidence in favor of the plaintiff. The verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto and your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourselves but do so only after an impartial hearing of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views, changing your opinion if convinced it is erroneous, but do not surrender your honest conviction to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are not partisans, you are judges, judges of the facts. Your sole interest is to ascertain the (35) truth from the evidence in the case. During the course of the trial I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. Do not assume I had any opinion on the matters as to which my questions were related. Remember at all times you as jurors are at liberty to disagree with comments of the court in arriving at your own finding as to the facts. It is the duty of the court to admonish an attorney who out of his zeal for his cause does something not in keeping within the rules of evidence or procedure.

(36) It is your duty to draw no inference against the side to whom any admonitions the court may have addressed during the trial of this case. It is the duty of

*Charge*

the attorneys on each side of the case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible. When the court has sustained the objection to a question, the jury are to disregard the question and may draw no inference from the wording of it or speculate as to what the witness may have said if permitted to answer. Upon allowing testimony or other evidence to be introduced over the objection of counsel, the court does not unless expressly stated indicate any opinion as to the weight or effect of such evidence. As stated before, you are the sole judges of the credibility of all witnesses and the weight and effect of all evidence. If a lawyer asks the question which contains an assertion of fact, you may not consider the assertions as evidence of this. The lawyers statements are not evidence. Upon retiring to the jury room your foreman will be the person seated in the first row nearest to me. The foreman will preside over your deliberations and be your spokesman in court. If it becomes necessary during the deliberations to communicate with the court, (37) you may send a note by one of the deputy marshals. Never attempt to communicate with the court by any means other than assigned writing. Bear in mind you are not to reveal to the court or to any person how the jury stands numerically or otherwise until you have reached a unanimous verdict on the entire case.

I'm going to send with you as I indicated to you the exhibits in this case. I'm also going to send with you by your foreman six interrogatories which you should answer yes or no in returning to the court at the time you render your verdict. I shall read them to you now; 1) Was the defendant shipowner negligent as alleged by plaintiff; 2) If your unanimous finding in answer to interrogatory number 1 above is yes, was the negligence of the defendant shipowner approximate cause of any injury sustained by the plaintiff; 3) at the time of the

*Charge*

accident was the conveyer between A and B decks in unseaworthy condition; that is to say, was it then and there not reasonably suitable and fit for the use intended; 4) if your unanimous finding in answer to interrogatory number 3 above is yes, was the unseaworthy condition of the conveyer approximate cause of any injury sustained by the plaintiff; 5) at the time of the accident did the use or the operation of (38) the conveyer render it in unseaworthy condition; 6) if your unanimous finding in answer to interrogatory 5 above is yes, was such unseaworthy condition approximate cause of any injury sustained by the plaintiff?

Now, if your answer to interrogatory 1, 3 and 5, 1, 3, and 5, or 2, 4, and 6, is no, your verdict must be for the defendant shipowner. If your answer to interrogatories 1, 3, or 5 is yes and your answer to the corresponding approximate cause question immediately following is one of those is no, your verdict will be for the shipowner. If your answer to interrogatories 1 and 2 or 3 and 4 or 5 and 6 or any two of such pairs or all three of such pairs is yes, your verdict will be for the plaintiff. I think you'll understand it when you get the interrogatories. You'll be able to follow them.

Now, that's the charge of the court and I'm going to take a moment to have a discussion with the attorneys on any questions of law and during this moment or two or recess you will all retire to the juryroom and not discuss the case, and not begin your deliberations until you have returned and receive any final instructions which are then given to you. The deputy marshals have been sworn and the alternates

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(53) or equipment aboard this vessel, if the equipment was not reasonably fit for the use for which it was intended, the ship is responsible.

The Court: I have so charged.

*Requests to Charge and Exceptions*

Mr. Bushlow: Not about how brought it on.

The Court: Yes, I did.

Mr. Bushlow: I have an exception, your Honor. I think that's it, your Honor.

The Court: That is all your pot shots?

Mr. Korson: I have nothing in addition.

Mr. Cichanowicz: I have no exception to the charge. I do have a request that the jury be charged that under the warranty of seaworthiness the ship owner is not required to supply the newest or latest or best equipment.

Mr. Sergi: Or most perfect.

The Court: I thought I had that in. I don't know how it got dropped out. I know he had, I know he had his request and I though I had it in. At one point I had it in, I don't know how it got lost out. I'm a little bit hesitant about doing it now. I'll see what the other requests are.

Mr. Korson: Well, your Honor, at no point did you charge new equipment was necessary, so I don't think the negative charge is necessary also.

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(55) supplementary? Well, I think that should be supplied to the jury. I didn't think that was made very clear.

The Court: I don't think there is any question in their minds.

Mr. Bushlow: It wasn't clear to me.

The Court: Come on, Mr. Bushlow.

Mr. Cichanowicz: I have nothing further.

Mr. Sergi: I have no exception. I do request that your Honor advise the jury that they have a right to all the exhibits.

The Court: I told them I was going to send them in.

Mr. Sergi: And the testimony.

Mr. Bushlow: I don't think they should have that.

Mr. Sergi: Can I be heard?

*Requests to Charge and Exceptions*

The Court: I told them I was going to send the—

Mr. Sergi: If I'm wrong, I'm wrong. I have another request, your Honor.

In view of what plaintiff's counsel has just advised the Court that they do not claim the movement of the conveyor had anything to do with the accident, but only that the sides of the conveyor is their claim, I now ask the Court to charge the jury that

(78) (The jury leaves the courtroom at 3:23 p.m.)

(The time noted is 3:50 p.m.)

The Court: Gentlemen, the jury has reached a verdict. I just want to make sure you all—better close that door. All agreement on how to handle this interrogatory. My thought would be that we'd have the clerk ask the foreman what the general verdict was and what the damages were if it's in favor of the plaintiff and then, ask him to hand me the interrogatories and then we'll ask him whether these are their answer to the interrogatories, the same procedure will be followed in the poll to the jury, whether this is their verdict and whether these are their answers to the interrogatories.

Mr. Bushlow: Fair enough.

The Court: I just hope that they are in no way inconsistent with one another. Bring in the jury.

(The jury enters the courtroom at 3:52 p.m.)

The Court: Mr. Foreman, I gather you've reached a verdict. Would you remain standing and answer the questions of the clerk, please.

The Court Clerk: First, Mr. Foreman, ladies and gentlemen of the jury, how do you find for the

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(79) plaintiff or for the defendant?

The Foreman: For the plaintiff in the amount of \$75,000.

The Court Clerk: The first interrogatory was the defendant shipowner negligent as alleged by the plaintiff?

The Foreman: Yes.

*Verdict*

The Court Clerk: The answer is yes?

If your unanimous finding to Interrogatory No. 1 was the negligence of the defendant shipowner approximate cause of any injuries sustained by the plaintiff?

The Foreman: Yes.

The Court Clerk: The answer is yes.

At the time of the accident was the conveyor between A and B decks in an unseaworthy condition; that is to say, was it then and there not reasonably suitable or fit for the use intended?

The Foreman: Yes.

The Court Clerk: The answer is yes.

If your unanimous finding in answer to Interrogatory 3 is yes, was the unseaworthy condition of the conveyor approximate cause of any injuries sustained by the plaintiff?

The Foreman: Yes.

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(80) The Court Clerk: The answer is yes.

The Interrogatory A, the time of the accident, did the operation of the conveyor render it in an unseaworthy condition.

The Foreman: Yes.

The Court Clerk: The answer is yes.

If your unanimous finding is yes, was such unseaworthy condition approximate cause of any injuries sustained by the plaintiff?

The Foreman: Yes.

The Court Clerk: The answer is yes.

The Court: Will you poll the jury and ask them whether that is their verdict and each of the answers is their answer to it.

The Court Clerk: Is that your answer to all of the interrogatories?

(The jury is polled and gives a positive response to the questions by the Court Clerk.)

*Special Verdict of Jury*

The Court: All right. Ladies and gentlemen of the jury, you go with the thanks of the Court for your attentiveness to the case during the past week and for performance of your duty as jurors in this district which is a difficult one and in any type of case, and I am certain it was not easy for you in this case. I don't know whether you have any further

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**Special Verdict of Jury.**

We, the jury in the above entitled action, unanimously find as follows:

- | Interrogatory:  | Unanimous Answer<br>of the Jury: |
|---|----------------------------------|
| (1) Was the defendant shipowner negligent as alleged by the plaintiff?  | Yes<br>[“Yes” or “No”]           |
| (2) If your unanimous finding and answer to Interrogatory (1) above is “Yes”, was the negligence of the defendant shipowner a proximate cause of any injuries sustained by the plaintiff? | Yes<br>[“Yes” or “No”]           |

*Special Verdict of Jury*

(3) At the time of the accident,  
was the conveyor between A  
and B decks in an unsea-  
worthy condition; that is to  
say, was it then and there not  
reasonably suitable and fit for  
the use intended?

Yes

[“Yes” or “No”]

(4) If your unanimous finding  
and answer to Interrogatory  
(3) above is “Yes”, was the  
unseaworthy condition of the  
conveyor a proximate cause of  
any injuries sustained by the  
plaintiff?

Yes

[“Yes” or “No”]

(5) At the time of the accident,  
did the use or operation of  
the conveyor render it in an  
unseaworthy condition?

Yes

[“Yes” or “No”]

(6) If your unanimous finding and  
answer to Interrogatory (5)  
above is “Yes”, was such un-  
seaworthy condition a prox-  
imate cause of any injuries  
sustained by the plaintiff?

Yes

[“Yes” or “No”]

For Pltf.

\$75,000

March 13, 1975.

Foreman of the Jury

**Opinion of Trial Court.**

PLATT, D. J.:

Plaintiff sued the defendant, Rudolf A. Oetker ("Oetker"), who owned the S.S. Polarstein (the "Vessel"), for injuries sustained while he was working as a longshoreman unloading a cargo of bananas from such Vessel when the same was berthed at Pier 42 East River, New York, on January 15, 1970.

The Vessel filed a third-party complaint against Bay Ridge Operating Co., Inc. ("Bay Ridge") and Standard Fruit & Steamship Co. ("Standard Fruit") alleging in the case of Bay Ridge a breach on its part of its warranty to perform its services as a stevedore (plaintiff's employer) in a reasonably safe, proper, careful, prudent and workmanlike manner, as well as affirmative negligence and fault and as against Standard Fruit negligence and breach of duty to supply reasonable safe, fit and seaworthy materials and conveyor equipment and tools.

Bay Ridge cross-claimed against Standard Fruit alleging negligence and breach of agreement to provide the Vessel with safe, proper, fit and seaworthy equipment and tools, and counterclaimed against the Vessel alleging negligence, breach of warranty of seaworthiness and breach of the express and implied terms of its contract with Bay Ridge. Standard Fruit in turn has cross-claimed for indemnification against Bay Ridge.

Standard Fruit owned, and furnished to the Vessel and Bay Ridge, the conveyor equipment used aboard the Vessel on January 15, 1970 to unload the banana boxes.

Bay Ridge was working aboard the Vessel on January 15, 1970, pursuant to a stevedore contract with Standard Fruit dated December 1, 1969.

*Opinion of Trial Court*

Bay Ridge installed, rigged, unrigged, repaired and maintained the conveyor equipment aboard the Vessel, including the operation and control of the conveyor equipment.

Plaintiff was lawfully aboard the Vessel as an employee of Bay Ridge on January 15, 1970, engaged in the performance of electrical maintenance work at about 10:30 p.m. on that date.

The reasonable value of the medical treatment provided for plaintiff as a result of his alleged accident and injuries sustained was \$2,184.98.

On January 15, 1970, about 10:30 p.m., the plaintiff, an electrical maintenance man, was working in the hold or on "D" deck in the #2 hatch disconnecting a conveyor when he was struck on the upper portion of his body by a box of bananas which fell from a point on a conveyor roller between B and A decks.

At that time identical conveyor belts had been installed from D deck to C deck and from C deck to B deck and belts identical to one another had also been installed along the B, C and D decks and a similar conveyor belt had been installed from B deck to A deck; all for the purpose of conveying banana boxes from D deck up and off the vessel at a point on the A deck.

The conveyors between the lower three decks had side rails approximately 3½ to 4½ inches high and the conveyor from B deck to A deck had side rails approximately 2½ to 3 inches in height.

The use of such different conveyors from B deck to A deck was, and had been for many years, apparently standard practice in the unloading of Standard Fruit's banana boxes.

Some months before the accident Standard Fruit had started using a new type of box known as a "Zulu" which was higher (by about 4 inches) and shorter than the old boxes used to crate and ship bananas. According to the

*Opinion of Trial Court*

testimony, during the day of January 15 the longshoremen had been unloading the old type boxes and around 6:30 to 7:00 o'clock in the evening the new type box (Zulus) started to come up the conveyors.

Standard Fruit and the Vessel, of course, knew that the taller boxes (the Zulus) were stowed in the lower decks of the Vessel and would be conveyed over the equipment which had been supplied by Standard Fruit and used for many years.

The operator (Jackson) of the conveyor between B deck and A deck testified that at some unspecified time before the accident a "mate" of the vessel was there at his station when a box fell from the conveyor into the hold apparently without injury to anyone. The mate, after observing this incident, left the scene without comment.

Fifteen minutes before the accident a "mate" of the vessel came to a point beside Jackson and the boxes got hung up on the conveyor belt between the B deck and the A deck. The mate asked Jackson whether a man was not supposed to be stationed at the point on the B deck where the conveyor turned to rise to the A deck; there was none there at the time to prevent the "hangup". Again, after observing this incident, the mate left the scene without any action or comment.

Following the mate's departure "the same thing happened" and, after the operator of the conveyor from B deck to C deck had "straightened" up the boxes again, Jackson started the belt again, it "jumped", the boxes started to tumble and one fell over the side of the conveyor, went down the hatch and struck the plaintiff working below on the D deck.

The testimony further showed that good and normal practice required that there be two (not one) longshoreman on B deck, one the operator of the conveyor from B deck to A deck. The latter was the person missing

*Opinion of Trial Court*

C to B deck and the other a "guider" for the boxes at the turning point from B deck to A deck. The latter was the person missing both shortly before and at the time of the accident.

The plaintiff argued to the jury that the defendant was negligent in that:

1. the defendant knew or should have known that the side rails on the conveyor from B deck to A deck were inadequate to contain the larger boxes of bananas (the Zulus) being conveyed from the B deck to the A deck.
2. the defendant knew or should have known that the operation was being conducted by insufficient personnel in that there was no longshoreman stationed at the turning point of the conveyor on B deck where it turned and rose to the A deck.
3. the defendant knew or should have known that no nets were in use below the conveyor in question, and
4. the defendant knew or should have known that the longshoremen were not wearing hard hats.

The plaintiff also argued to the jury that the Vessel was unseaworthy in essentially the same respects, namely, 1) inadequate side rails on the B to A deck conveyor, 2) insufficient personnel and no longshoreman stationed at the turning point of the conveyor on the B deck, 3) no safety nets and 4) no hard hats.

Defendant's expert, Paul J. Keeler, testified that the practice in the industry did not require nets or hard hats to be used in circumstances such as existed in the case at bar and that neither of them were ever used in such cases. While the Safety and Health Regulations for Longshoring provide for the use of nets when two gangs are working in the same hatch on different levels and

*Opinion of Trial Court*

the use of hard hats under certain conditions, the Court is not persuaded that the use or lack of use of hard hats was a contributing factor herein or that the provision for the use of nets where there was a "gang" operating in an upper deck has any application to the facts herein.

In response to special interrogatories, the jury found the shipowner negligent as alleged by the plaintiff and that such negligence was a proximate cause of the plaintiff's injuries. The jury also found that the conveyor between the B deck and A deck was in unseaworthy condition in that it was not reasonably suitable and fit for the use intended and that such unseaworthiness was a proximate cause of the plaintiff's injury and further that the use or operation of the conveyor rendered it in an unseaworthy condition which was a proximate cause of the plaintiff's injuries.

The Court sustains the jury's verdict and the jury's answers to the special interrogatories.

The Court further finds that the third-party defendant, Standard Fruit, knew or should have known that the taller or Zulu banana boxes were stowed in the lower hold of the Vessel and that the side rails on the conveyor customarily used from B deck to A deck were inadequate to contain the taller boxes being transported on the conveyor from the B deck to the A deck. It is undisputed that the conveyors themselves were owned and furnished to the other defendants by Standard Fruit for use in the unloading operation. Such negligence on the part of Standard Fruit in providing the other defendants with unseaworthy equipment was one of the proximate causes of the accident and plaintiff's injuries.

Under *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc., et al.*, 417 U. S. 196, 94 S. Ct. 2174 (1974), Standard Fruit is, together with the Vessel, a joint tortfeasor against whom contribution may be had since it is

*Opinion of Trial Court*

not immune from tort liability by statute. See also *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 72 S. Ct. 277 (1952).

As was also true in the *Kopke* case, the Court finds "it difficult from the evidence to 'evaluate exactly the responsibility between the shipowner on the one hand and [Standard Fruit] on the other'". The Court will, therefore, divide the liability equally between the Vessel and Standard Fruit.

The Vessel interposed a cross-claim over against the third-party defendant, Bay Ridge, and it claims indemnity from Bay Ridge for breach of its warranty of workmanlike performance.

Defendant, Bay Ridge, argues that there was action or inaction on the part of the shipowner which prevented, hindered or seriously handicapped the stevedore in performing a workmanlike job which precludes the shipowner's claim for indemnity. (See *Conceicao v. New Jersey Export Mar. Carpenters, Inc.*, 508 F. 2d 437 [2d Cir. 1974]). The "inaction" by the mate of the vessel when he observed a banana box fall into the hold and the absence of a longshoreman on B deck at the turning point of the conveyor from B deck to A deck shortly before a banana box fell on the plaintiff was not, in the opinion of the Court, such as would "prevent, hinder or seriously handicap" Bay Ridge in performing a workmanlike job. There is no question but that the absence of Bay Ridge's longshoreman from his station at the turning point was negligence and rendered the conveyor unseaworthy and was one of the proximate causes of the accident and plaintiff's injuries herein.

In the *Conceicao* case, *supra*, the test for the allowance for indemnity in this type of case was set forth in the following language (508 F. 2d at page 443):

"\* \* \* The allowance or disallowance of indemnity in this type of case depends upon a balance

*Opinion of Trial Court*

or interplay of the doctrines of unseaworthiness, negligence and breach of the implied contract of workmanlike performance that Judge Clark, in the leading case of *DeGioia v. United States Lines Company*, 304 F. 2d 421 (2d Cir. 1962), stated as follows, at p. 426:

The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved.

This test was approved and applied by the Supreme Court in *Italia Societa v. Oregon Stevedoring Co., Inc.*, 376 U. S. 315, 324-325, 84 S. Ct. 748, 11 L. Ed. 2d 732 (1964)."

It is clear that the party in this case most able to minimize the risk involved insofar as the insufficiency and absence of longshoremen were concerned, was Bay Ridge.

Under the circumstances, the Vessel is entitled to full indemnity from the defendant Bay Ridge for its portion of the damages plus attorneys fees. *Ryan Stevedoring Co., Inc., v. Pan-Atlantic Steamship Corporation*, 350 U. S. 124, 76 S. Ct. 232 (1956).

Bay Ridge and Standard Fruit have further interposed cross-claims against each other, both claiming the right to indemnification from the other, and the third-party defendant, Bay Ridge, has interposed a counterclaim against the shipowner claiming a right of indemnification from him. These cross-claims and counterclaim must be dismissed. Standard Fruit's action and inaction with respect to the inadequate and unseaworthy conveyor was such as to prevent, hinder or seriously handicap the

*Opinion of Trial Court*

stevedore in performing a workmanlike job and Bay Ridge's action or inaction with respect to the insufficiency of a longshoreman on B deck to guide the banana boxes on the conveyor was such as to preclude it from any right to indemnification.

Under the test prescribed by the *Conceicao* decision, *supra*, the result is the same since Standard Fruit was the party most able to minimize the particular risk involved insofar as the conveyors were concerned and, as indicated above, Bay Ridge was such party insofar as the insufficiency or absence of longshoremen were concerned.

If the parties are unable to agree upon defendant's attorneys fees, affidavits in support thereof and in opposition thereto should be submitted within twenty (20) days of the date of this Order.

So Ordered.

THOMAS C. PLATT  
*U.S.D.J.*

**Judgment.**

This action came on for trial before the Court and a jury, Honorable Thomas C. Platt, United States District Judge, presiding, and the Court having instructed the jury to find a special verdict and also to make answer to certain interrogatories, and the jury having duly rendered a verdict and having made answer to said interrogatories, and the Court in its Opinion, filed on May 9, 1975, having sustained the jury's verdict and the jury's answers to the special interrogatories, and the Court having made further findings of fact, it is

ORDERED and ADJUDGED that the plaintiff, Michael Castellano, recover of the defendant, Rudolf A. Oetker, "Polarstein", the sum of \$75,000, with interest from March 13, 1975, by stipulation, and his costs of the action, and it is further

ORDERED and ADJUDGED that the defendant and third-party plaintiff, Rudolf A. Oetker, recover of the third-party defendant, Standard Fruit & Steamship Co., the sum of \$37,500 together with interest thereon and one half the sum to be taxed as costs in favor of the plaintiff, Michael Castellano, against the defendant and third-party plaintiff, and it is further

ORDERED and ADJUDGED that the defendant Rudolf A. Oetker, "Polarstein", be fully indemnified by the third-party defendant, Bay Ridge Operating Co., Inc., for its portion of the damages (to wit \$37,500) together with interest thereon plus attorneys' fees and costs, allocable thereto (or 50% thereof) and it is further

ORDERED and ADJUDGED that the cross-claims interposed by the third-party defendants Bay Ridge Operating Co.

**246a**

*Judgment*

Inc. and Standard Fruit & Steamship Co., against each other, and the counterclaim of Bay Ridge Operating Co. Inc. interposed against the shipowner, Rudolf A. Oetker, are dismissed.

Dated: Brooklyn, New York  
May 20, 1975

**LEWIS ORGEL**  
Clerk

By: **THOMAS B. COSTELLO**  
Chief Deputy Clerk

Approved:

**THOMAS C. PLATT**  
U.S.D.J.

**Adendum to Judgment.**

**[SAME TITLE.]**

That since the filing of the judgment in this matter on May 21, 1975 the attorneys for the defendant and third-party plaintiff have come to an agreement with the attorneys for the third-party defendant, Bay Ridge Operating Co., Inc. and third-party defendant, Standard Fruit & Steamship Co., as to counsel fees and disbursements and they have agreed that the counsel fees and disbursements payable by the third-party defendants to the defendant and third-party plaintiff shall be in the sum of \$7500.00 and that the third-party defendant, Bay Ridge Operating Co., Inc. and third-party defendant, Standard Fruit & Steamship Co. equally pay \$3750.00 to the defendant and third-party plaintiff and, it is

ORDERED and ADJUDGED that the defendant and third-party plaintiff, Rudolf A. Oetker, recover from the third-party defendants, Bay Ridge Operating Co., Inc. and Standard Fruit & Steamship Co. the sum of \$7500.00 to be paid equally by both third-party defendants, and it is

FURTHER ORDERED that this judgment for the counsel fees and costs be attached to and considered part of the original judgment heretofore entered May 21, 1975

Dated: Brooklyn, New York

Clerk

By:

Chief Deputy Clerk

Approved:

U.S.D.J.

**Notice of Appeal—Standard Fruit.**

[SAME TITLE.]

SIRS:

Please Take Notice that Third Party Defendant Standard Fruit & Steamship Co. does hereby appeal to the Court of Appeals, Second Circuit from a judgment entered in the office of the clerk of the within court granting judgment to the defendant and third party plaintiff Rudolf A. Oetker against Third Party defendant Standard Fruit & Steamship Co. in the sum of \$37,500.00 together with interest thereon and one half of the sum to be taxed in favor of the plaintiff Michael Castellano, against the defendant and third party plaintiff, and any and all sums allocable to attorneys fees and costs, as may be taxed to Third Party Defendant Standard Fruit and Steamship Co., and Third Party Defendant Standard Fruit & Steamship Co. further appeals from the judgment entered in favor of plaintiff Michael Castellano against defendant and Third party plaintiff Rudolf A. Oetker in the sum of \$75,000.00 with interest thereon from March 13, 1975, and from each and every part thereof, and on the grounds of excessiveness, and on questions of fact and law.

Dated: Brooklyn, New York  
May 23, 1975

Yours etc.,

SERGI & FETELL

Counsel to John J. Langan, Esq.  
Attorneys for Third Party Defendant Standard Fruit & Steamship Co.

LESTER E. FETELL  
A Member of the Firm  
Office and P. O. address  
44 Court Street  
Brooklyn, N. Y. 11201

*Notice of Appeal of Bay Ridge Operating Co., Inc.*

To:

Irving B. Bushlow, Esq.  
Attorney for Plaintiff  
No. 26 Court Street  
Brooklyn, New York 11201

Cichanowicz & Callan, Esqs.  
Attorneys for Defendant and  
Third Party Plaintiff  
No. 80 Broad Street  
New York, New York 10004

Sergi & Fetell, Esqs.  
Attorneys for Third Party  
Defendant, Standard Fruit  
No. 44 Court Street  
Brooklyn, New York 11201

Clerk  
United States District Court  
Eastern District of New York  
Cadman Plaza  
Brooklyn, New York

**Notice of Appeal of Bay Ridge Operating Co., Inc.**

[**SAME TITLE.**]

SIRS:

Please Take Notice that third party defendant, Bay Ridge Operating Co., Inc., hereby cross appeals to the United States Court of Appeals for the Second Circuit from the judgment entered in two (2) parts on May 21st, 1975 and on June 11th, 1975, which provided in the first part thereof, dated May 20th, 1975, that the plaintiff recover from the defendant and third party plaintiff the sum of \$75,000., with interest from March 13th, 1975, with costs, and that the said defendant and third party plaintiff recover from each of the third party defendants the sum of \$37,500. with interest, attorneys' fees and costs, as set forth therein, and dismissing the cross claims and counter-claim, and which provided in the second part of said judgment, dated June 6th, 1975, that the defendant and third party plaintiff recover from the third party defendants the sum of \$7,500. as counsel fees, to be paid equally by the third party defendants, and which second part is captioned "Addendum To Judgment" and states that it is "to be attached to and considered part of the original judgment heretofore entered May 21, 1975".

Dated: New York, New York  
June 16th, 1975.

KIRLIN, CAMPBELL & KEATING  
By ROBERT P. HART  
A Member of the Firm  
Attorneys for Third Party De-  
fendant, Bay Ridge  
No. 120 Broadway  
New York, New York 10005

*Notice of Appeal—Standard Fruit*

To:

Irving B. Bushlow, Esq.  
Attorney for plaintiff  
26 Court Street  
Brooklyn, N. Y. 11201

Kirlin, Campbell & Keating, Esqs.  
Attorneys for 3rd party defendant  
Bay Ridge Operating Co. Inc.  
120 Broadway  
New York, N. Y.

Chicanowicz & Callan, Esqs.  
Attorneys for defendant  
Rudolf A. Oetker,  
80 Broad Street  
New York, N. Y.

Clerk:

United States District Court  
Eastern District of New York  
Cadman Plaza  
Brooklyn, N. Y.

**Notice of Protective Cross-Appeal by Defendant and  
Third-Party Plaintiff Rudolf A. Oetker.**

[SAME TITLE.]

SIRS:

Please Take Notice that defendant Rudolf A. Oetker, "Polarstein", hereby appeals protectively to the United States Court of Appeals for the Second Circuit from those portions of the judgment filed and entered herein on May 21, 1975 that ordered and adjudged that the plaintiff, Michael Castellano, recover of the defendant, Rudolf A. Oetker, "Polarstein", the sum of \$75,000.00, with interest from March 13, 1975, by stipulation, and his costs of the action.

Dated: New York, New York  
June 12, 1975

Yours etc.,

CICHANOWICZ & CALLAN  
Attorneys for Defendant and  
Third-Party Plaintiff  
By: VICTOR D. CICHANOWICZ  
A Member of the Firm  
80 Broad Street  
New York, New York 10004  
(212) 344-7042

*Notice of Protective Cross-Appeal by Defendant and  
Third-Party Plaintiff Rudolf A. Oetker*

To:

Irving B. Bushlow, Esq.  
Attorney for Plaintiff  
26 Court Street  
Brooklyn, New York 11201

Kirlin, Campbell & Keating, Esqs.  
Attorneys for Bay Ridge  
120 Broadway  
New York, New York 10005

Sergi & Fetell, Esqs.  
Attorneys for Standard Fruit  
44 Court Street  
Brooklyn, New York 11201

Clerk:

United States District Court  
Eastern District of New York  
Cadman Plaza  
Brooklyn, New York



THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CASTELLANO

v

OETKER,

AFFIDAVIT  
OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

AFRIM HASKAJ

deposes and says that he is over the age of 21 years and resides at

being duly sworn,  
1481 42nd street, Bklyn, NY

That on the 21st day of april, 1976 ,  
XXXXX, 1976

he served the annexed appendix upon

brief of third party defendant - appellant Standard Fruit Co  
Exhibit Volume

Kirlin Campbell & Keating, attorneys for Bay Ridge Op Co, 120 broadway, NY, NY

Cichanowicz & Callan, attorney s for Rudolph A Oetker, 80 Broad street, N.Y, N.Y

Irving B. Bushkow, attorney for the plaintiff-appellee, 26 court street, NY, NY

in this action, by delivering to and leaving with said attorneys

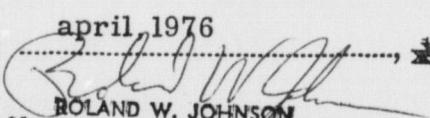
three copies each of the brief and appendix and ~~xxxxxxxxxxxxxx~~  
one copy each of the Exhibit volume

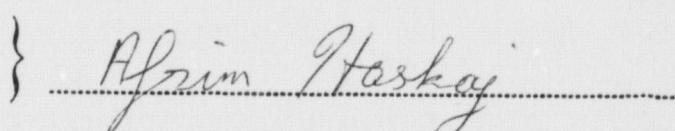
DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

21st

Sworn to before me, this .....  
day of april 1976, 1976

  
ROLAND W. JOHNSON  
Notary Public, State of New York  
No. 4509705  
Qualified in Delaware County  
Commission Expires March 30, 1977

  
Afrim Haskaj